United States Court of Appeals

for the Second Circuit

APPENDIX

75-4021

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT
TELEVISION PRODUCERS AND DISTRIBUTORS, Case No. 75-4021
Petitioner,

WARNER BROS. INC., ET AL., Case No. 75-4024,
Petitioner,

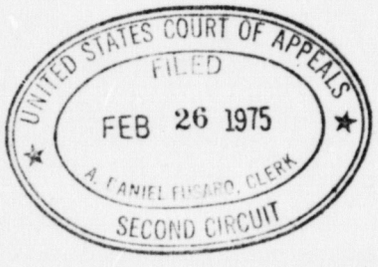
SANDY FRANK PROGRAM SALES, INC., Case No. 75-4025,
Petitioner,

WESTINGHOUSE BROADCASTING COMPANY, INC., Case No. 75-4026,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
COLUMBIA BROADCASTING SYSTEM, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
WESTINGHOUSE BROADCASTING COMPANY, INC.,
WARNER BROS. INC., ET AL.,
NATIONAL COMMITTEE OF INDEPENDENT
TELEVISION PRODUCERS, ET AL.,
Intervenors.



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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 72-957
88931

In the Matter of	)	
	)	
Consideration of the operation	)	Docket No: 19622
of, and possible changes in,	)	
the "prime time access rule",	)	RM-1967
Section 73.658(k) of the	)	RM-1935
Commission's Rules	)	RM-1940
	)	RM-1929
Petitions of:	)	
	)	
National Broadcasting Company, Inc. (NBC)	)	
	)	
Midland Television Corporation	)	
(KMTC, Springfield, Missouri)	)	
	)	
Kingstip Communications, Inc.	)	
(KHFI-TV, Austin, Texas)	)	
	)	
(for deletion of the rule)	)	
	)	
MCA, Inc.	)	
	)	
(to permit use of "off-network" material plus 25% new material)	)	

NOTICE OF INQUIRY
and
NOTICE OF PROPOSED RULE MAKING

Adopted: October 26, 1972 **Released:** October 30, 1972

By the Commission: Commissioners Robert E. Lee and H. Rex Lee concurring and issuing statements; Commissioners Johnson and Hooks concurring in part and dissenting in part and issuing statements.

I. INTRODUCTION AND DISCUSSION

A. Introduction

1. In this proceeding, the Commission seeks information as to the effect and operation of Section 73.658(k) of its Rules -- the "prime time access rule" -- and invites comments on changes in that regulation which may be appropriate for the future. The categories of information sought, and possible changes, are discussed at some length below. One matter should be clarified at the outset: while "possible changes" include repeal of the rule, the institution of this proceeding does not represent a Commission view at this time that the rule should be repealed, now or later. See par. 15, below.

2. Section 73.658(k) was adopted in the Report and Order in Docket 12782, May 1970 (23 FCC 2d 382, 18 R.R. 2d 1825). It was affirmed generally on reconsideration in August 1970 (25 FCC 2d 318, 19 R.R. 2d 1869). In general, it provides that after October 1, 1971, network-affiliated stations in the "top 50 markets" may present, during the four hours of "prime time" each evening, no more than three hours of material from the three national networks, ABC, CBS and NBC. Effective October 1, 1972, subparagraph (k)(3) of the rule provides that the time thus cleared of network programs (i.e., one hour a night, generally the hour from 7 to 8 p.m. E.T. and P.T., 6 p.m. C. T. and M. T.) may not be filled with "off-network" material (programs which have appeared on one of the three networks) or feature films which have been shown by a station in the market within the past two years. Thus, in effect, one hour of prime time each night must be devoted to material which is neither network programming nor in one of these other categories. 1/ The basic purpose of the adoption of the rule was set forth as follows (23 FCC 2d 395-396, par. 23, 18 R.R. 2d 1844):

> "We believe this modest action will provide a healthy impetus to the development of independent program sources, with concomitant benefits in an increased supply of programs for independent (and, indeed affiliated) stations. The entire development of UHF should be benefitted ... It may also be hoped that diversity of program ideas may be encouraged by removing the three-network funnel for this half hour of programming. In light of the unequal competitive situation now obtaining, we do not believe this action can fairly be considered "anti-competitive" where the market is being opened through a limitation upon supply by three dominant companies ...:

1/ At the same time as the "prime time access rule", the Commission also adopted other restrictions on the three networks, contained in Section 73.658(j) and sometimes called the "syndication" and "financial interest" rules. These sharply restrict the extent to which these organizations may engage in the non-network distribution of TV programs, or "syndication", or acquire interests in TV programs other than the right to network exhibition. These rules are not directly involved in the present proceeding. The "prime time access rule" applies by its terms only to the top 50 markets. However, the networks decided that, as a matter of business judgment, they could not continue to present more than three hours of prime-time programs for the rest of the country if barred from access to their affiliated stations in the top 50 markets for more than that amount of prime time. Therefore, network prime-time schedules have been cut back to 3 hours a night across the board, generally a half-hour less than had previously been programmed by them.

3. Among the matters to be considered herein are the various petitions listed above. 2/ We shall describe briefly the petitions and oppositions thereto, and then set forth the Commission's purposes in this proceeding, dealing with the prime time access rule and the "access period." 3/

4. Another pending petition to limit use of TV "re-runs" generally. This proceeding does not directly involve the subject-matter of another recently filed petition, that by Mr. Bernard Balmuth and a group called S.T.O.P. (Save Television Original Programming), asking for a general rule limiting use of prime-time repeat material on network-owned or network-affiliated stations to 25% of the broadcast year (RM-1977). This petition, which has drawn substantial support and opposition, will be considered by the Commission in the near future. It is not to be considered in the present proceeding, as such, but the two are clearly related to a degree; for example, the feasibility of developing and producing a given non-network series could vary depending on whether the supplier must furnish 39 individual programs (75% of 52 weeks) or may get by with as few as 26 (50%) or perhaps even less. We merely call attention here to the pendency of this petition, and to the fact that it may be appropriate to give this subject consideration in rulemaking. Parties may wish to prepare their comments herein with this in mind.

2/ Three of the petitions seek, in effect, repeal of the rule -- those of NBC and the two individual stations listed, both UHF stations in comparatively small "intermixed" markets. These three petitions have been supported by some individual station licensees (not all of them identified); the NBC petition has been opposed by Westinghouse Broadcasting Company, Inc. (Westinghouse, a large station owner and supplier of non-network program material, and long one of the chief proponents of the rule) and by American Broadcasting Companies, Inc. (ABC) insofar as NBC seeks rule-making looking toward early repeal of the rule. Hughes Sports Network also opposed the two UHF petitions.

3/ The term "access period" is used herein to refer to the portion of prime time which is generally cleared of network programs in the top 50 markets, as the rule operates. For the 1971-72 season, this has included all nights from 7 to 7:30 p.m. E.T. and P. T. (6-6:30 p.m. C.T.); 7:30-8 p.m. E.T. (6:30-7 p.m. C.T.) except for all networks' affiliates on Tuesday nights and CBS and NBC affiliates on Sunday nights; and 10:30-11 p.m. E.T. (9:30-10 p.m. C.T.) for CBS and NBC affiliates on Tuesdays, ABC affiliates on Wednesdays, NBC stations on Fridays, and CBS affiliates on Sundays. There are a number of exceptions to this general pattern.

For 1972-73, the "access period" will be more uniform as far as nights of the week are concerned, being 7-8 p.m. E T. and P.T. (6-7 p.m. C.T.) on all nights for ABC stations and all but Sundays on CBS and NBC; and, on Sundays, 7-7:30 p.m. and 10+30-11 p.m. for CBS and NBC affiliates.

B. The petitions for rule making.

5. As mentioned, three of the above-captioned petitions for rule-making -- those of NBC and two UHF stations in comparatively small "intermixed" markets -- seek repeal of the rule, the two individual petitions both apparently asking it for this coming year, 1972-73, and NBC envisioning it in time for the 1973-74 season. NBC asks the Commission to initiate forthwith a Notice of Proposed Rule Making broad enough to include rescission of the rule, to develop on an expedited basis the facts as to how the rule is operating, and to convene a conference among members of the staff and all interested parties, to devise methods to obtain this material promptly and completely. NBC's argument relates largely to the asserted decline in the television audience in the 7:30 - 8 p.m. (E.T.) period, compared to what it has been when network programs were presented then, assertedly 7% in the top 50 markets and 6% elsewhere, compared to no change or some increase for the remainder of prime time (and also an increase for Tuesdays, when the networks have begun their programming at 7:30 following the waiver to ABC). 4/ While NBC recognizes that part of the audience change has been a shift to independent stations from network affiliates, it asserts that, as the above figures show:

> ... the preference for network programming is so strong that millions of viewers would rather not watch television at all than watch non-network programming.

Therefore, it is claimed, as shown by the other two petitions, stations are adversely affected, particularly those in small markets which always have had narrower margins. NBC also claims that the rule has not been and will not yield benefits in terms of an expanded production of quality first-run material, or of increased diversity of programming. It is claimed that there are very few new producers, and that many, and the most successful, "first-run" programs are those which are continuations or revivals of network prime-time or daytime material (Hee Haw, Lawrence Welk, Wild Kingdom, Let's Make a Deal, To Tell the Truth, Truth or Consequences, What's My Line and Juvenile Jury are cited as examples). A study by an advertising agency of November 1971 non-network programming (7:30 - 8 p.m. E.T.) is cited, giving for the top 10 programs in audience two off-network series, five continuations of network series, two revivals, and only one entirely new series (Primus),

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4/ Other sources discussing this subject, including Westinghouse Broadcasting Co. in opposing the petition, claim lesser audience-loss figures, such as 4% or 2% over-all for the 7:30 - 8 p.m. period. It appears unquestionable that, in markets where there are independent stations as well as network affiliates, there has been a shift in viewing during this period away from the affiliates to the independents.

with only one of them reaching an audience as large as the tenth-rated 7:30 - 8 p.m. network program of the previous year, High Chaparral.

6. Westinghouse Broadcasting Company, Inc. (Westinghouse), which is both a large multiple TV and radio owner and an extensive supplier of syndicated material, vigorously opposes the NBC petition, as premature and unsupported. It is urged that as far as gathering information is concerned, a new proceeding is unnecessary; Docket 12782, which was not closed out, can be re-opened for this purpose; and that adoption of the proposal will have a most discouraging effect on the development of non-network material, and in fact will "make a mockery" of the full and fair test which the rule is supposed to have this coming year, adding to the uncertainty which already unfortunately prevails and which has a depressing effect on the program-production activity. Westinghouse asserts that despite NBC's criticism of the course of non-network program development, it lists 32 new first-run series, of which several are properly regarded as truly innovative (cited are Westinghouse's Doctor in the House, David Frost Revue and Norman Corwin Presents, Primus from Metromedia, and Story Theatre and Rollin' on the River from Winters-Rosen). Westinghouse claims that this is a good record, particularly in view of the adverse circumstances which prevailed (the uncertainty as to the rule itself until it was affirmed on appeal in May 1971, which gave producers little time before the fall season, and the exemption to permit use of "off-network" material) and the industry's traditional preference for proven and successful program ideas. ABC's arguments in opposition to a rule-making (though not to the gathering of information) are much the same as those of Westinghouse; it is said that development of a viable first-run syndicated programming market may well require innovation, and that "Innovation typically follows from experimentation; and experimentation requires time." In short, it will be several years before a really sound judgment can be reached as to the success of the rule, or lack of it; and that meanwhile the Commission can best maximize the chances for success by going on record to the effect that the Rule will be given a reasonable opportunity -- not "one year of full effectiveness under the 'gun' of a repeal proceeding." 5/

5/ ABC asserts that the lower audience mentioned by NBC may reflect largely the presentation of "off-network" material during the access period -- naturally, people prefer present network programming to former network programming.

Hughes Sports Network, opposing the two UHF petitions although not that of NBC, briefly urged some of the same arguments as Westinghouse and ABC, including the assertedly "premature" nature of any proceeding at this time.

7. In reply, NBC added somewhat to some of its earlier arguments. It stated that 1972-73 is as good a "test" year as any, and that the pendency of a rule-making proceeding can have no adverse effect on the results of such a test, since the programming which is available will already have been planned and largely produced, before the fall season begins.

8. The petitions by the two UHF stations mentioned, essentially similar to each other, emphasize the "economic injury" argument urged by NBC, particularly with respect to their own situations as UHF stations in intermixed markets, at a competitive disadvantage vis-a-vis the VHF stations in the same markets (two in Springfield, Mo., one in Austin, Texas). They claim that they are able to survive as long as they have the exclusive right to present a full line-up of one of the three networks in their areas; but with the "access rule" cutback, they are seriously injured, through loss of the network revenues which they formerly received for the time involved and through having to pay the costs of programming the time themselves. It is said that, with the lower audience which is obtainable for the non-network material (particularly with the greater problems in tuning UHF to begin with), the small revenues they obtain from selling the time on a non-network basis do not begin to compensate for these increased costs. The point is also made that, with non-network material being extremely costly, they cannot compete for desirable "access time" programs with their VHF competitors. Hughes Sports Network opposed these filings.

9. The MCA, Inc. petition. The petition of MCA, Inc. (RM-1929) looked toward the adoption of rules (in time for the 1972-73 season) under which material would comply with the "off-network" restrictions of the rule if it consisted of "off-network" material plus about 25% new material (4 programs out of 13, 7 out of 26, etc.). MCA urged this as a measure to permit more production of new non-network material of quality, by eliminating some of the tremendous costs and risks involved in an entire new series. It was claimed that this would mean more good-quality material, at lower cost and thus more easily available to stations, particularly those in small markets and UHF stations in intermixed markets, which often have limited resources. MCA has long been a vigorous opponent of the rule, and expressed here its doubts as to its merits; but it stated that this is one small step which the Commission can, and should, take quickly to ease part of the problem. The Commission denied this petition in April 1972 (Petition of MCA, Inc., 34 FCC 2d 825, 24 R.R. 2d 1771). 6/ The chief basis of decision was the that the petition -- which sought a change in time for the 1972-73 year--was premature.

6/ In its present rule-making petition, NBC mentions the MCA petition and asserts that, if the Commission is going to give consideration to this type of change in the rule, it might well give consideration also to letting new network material back into the cleared time, rather than older "off-network" programming.

C. The reasons for this proceeding and the Commission's views on it.

10. There is clearly a need for a proceeding dealing with the prime time access rule. First, there is the need to gather information about how the rule is working, both as compared to no rule and as compared to how it would work with various changes discussed herein. As to the propriety of gathering such information at this time, there appears little room for argument, and, indeed, no party really contests this. This Commission has some degree of obligation to conduct a continuing examination into the effect of any of its rules; and this is particularly true where, as here, the rule represents a breakthrough into a new area of regulation, previously not subject to rules or restrictions. It is especially true here because of the degree of controversy which surrounded the rule both before and since its adoption. Also, we expressed in our decision in Docket 12782 the belief that the rule should and would be examined from time to time, to see what changes, if any, should be made in it. Therefore some gathering of information is clearly in order. This could be done in Docket 12782; but that proceeding is over 10 years old and a great volume of material has been accumulated in it. We believe it preferable, from the standpoint of reaching prompt decisions herein, to call for the submission of the new, current material in a new proceeding. However, Docket 12782 has not been closed out, and the material therein is rather readily available; we will accept comments referring to it just as if the material were re-submitted herein.

11. Also, as far as the information-gathering may be "premature", we recognize that information for the 1972-73 year, which is what basically will be involved here, may not be as favorable to the rule as that for some later period, when more of the necessary adjustments and developments involved have occurred. However, we believe that, if allowance is made for further developments, as commenting parties are urged to outline in as much detail as is now possible, a fairly accurate idea of the rule's prospects can be obtained at this point. We will make such allowances in reaching any decision herein.

12. There is a second clear basis for this proceeding: the apparent need for certain changes in the rule if it is to operate in the public interest to the maximum extent. These include some of a more or less mechanical nature, to ease the burden on affected parties and the Commission, and others of a more substantial nature. The need for changes, as outlined herein, does not need much elaboration. The rule in its application and administration has given rise to a very large number of waiver requests, which have been a burden to the parties involved and to us. It is, obviously, highly desirable to eliminate the need for many of these, by adopting general rules which more nearly fit the range of situations which are involved.

The sports area is one example of situations where a general rule would appear feasible and much preferable to present practice. Probably of more basic significance are areas such as the "off-network" situations, where it is questionable whether the rule if literally applied would serve the public interest, and where, at the same time, any deviation from it on an ad hoc basis appears to give problems. Moreover, apart from the specific problems in various areas which have arisen, there is a more general consideration. No "new rule", such as this one, can be expected to be 100% sound and correct when it is first adopted. After a year's experience under it, it is appropriate to see how it is working and make those changes which appear appropriate.

13. Thus, in view of the above considerations, an over-all proceeding is warranted at this time. We have decided to include in that proceeding the question of whether the rule should be retained or rescinded. Three of the petitions before us, listed above, have raised this question, and in our view these can best be disposed of in the context of this proceeding, and particularly in light of the information gleaned through it. In any overview such as this, we should have flexibility to take any and all actions which the record may show to be in the public interest. Moreover, we see no adverse consequence from proceeding in this fashion. The programming for the 1972-73 season will not be affected because, as NBC points out, it is already "set", or virtually so. As to the effect on the future, particularly the 1973-74 season, the short answer is that we plan to gather the data and dispose of the basic issues raised by the petitions on a prompt basis-- in early 1973, and before there can be too much of an untoward effect on the 1973-74 season.

14. Indeed, from the point of view of the proponents of the rule, this approach should be advantageous, because -- if the review is favorable to the rule -- it will remove any cloud over it, not only for the next year but quite likely for several years to come. To put it otherwise, there must be an overview, in light of the nature of the rule and need for at least some changes in it, and, that being so, it is better to effect the overview at this point and "get this matter behind us." As to the timing of this examination, the "off-network" and "feature film" provisions of Section 73.658(k)(3) will now be in effect, and we should be able to get a good indication of the rule's prospects. As stated, we will make due allowance for the fact that the rule is still fairly new, so that perhaps it has not yet reached its full potential. Parties are urged to comment, in as much specific detail as possible, on what significance should be attached to the fact that the rule is still rather new, and any related uncertainties.

15. We make one final point -- although it should be unnecessary. The Commission has not adopted any decision or view, even of a tentative nature, as to the desirability of rescinding the rule. It would be wholly wrong for us to do so, when the 1972-73 year is just getting under way and there is no data before us as to the efficacy of the rule under full conditions, i.e., with Section 73.658(k)(3) in effect. Indeed, we stress that the presumption is the other way: the Commission has a rule which is now going into full effect, and there is thus a clear and considerable burden upon the opponents to demonstrate that, in actual operation, the rule will not serve the public interest, particularly in light of the purposes set forth in paragraph 2, above. This proceeding gives interested parties an opportunity to make showings on this critical issue, and thus facilitate an informed Commission decision. In light of the petitions and other circumstances, nothing less would be appropriate, but nothing more is to be inferred from what is simply a sound and fair way to proceed to the disposition of significant pending petitions.

II SPECIFIC INFORMATION REQUESTED AND SUBJECTS INVOLVED

A. Information sought

16. As mentioned, one of the most important purposes of this proceeding is to gather information about the operation of the prime time access rule, both in relation to the changes proposed herein (including rescission of the rule), and generally for the Commission's guidance as to the future. What is sought is information as to effect and impact -- from the operation of the rule as compared to operation without it, and from the various modifications considered herein (and past waiver actions) as compared to operation under the rule as now in effect. The effect on future development is also highly important. The specific points covered below are all subsidiary to that general objective. The information sought falls into two general areas: programming information and economic information, the latter involving three aspects -- the impact on stations, the economics of program production and distribution, and the effect on the program production business. In both areas, the Commission expects to rely partly on data other than that submitted in comments, as discussed below; but unquestionably commenting parties can be of considerable assistance if their information is specific and complete.

17. Programming data. With respect to programming, the Commission intends to rely partly on data contained in TV Guide for the various parts of the country, and also American Research Bureau (ARB) audience survey material, which lists the programs presented by stations covered (e.g., May 1972). However, this data is not always completely informative as to the nature of the program; we hope that as many TV station licensees as possible will present information in this area (including the networks, both as networks and as station licensees). As mentioned, the primary objective is to obtain information as to the effect and impact of the rule or possible changes in it (or waivers of it). 7/ The specific information sought is as follows:

(a) The programs that the station has been presenting in the "access periods" during 1971-72, will present in 1972-73, and will present further in the future as far as it can be projected: (1) under the rule basically as it now stands; (2) if there were no "prime time access rule"; 8/ (3) with various changes in the rule, including adoption of a "21 hours a week"

7/ While this investigation relates largely to "top 50 markets" network-affiliated stations, other stations are invited to comment, since the rule in practice has had an effect "across the board."

8/ If there is no other information indicating what would be the station's practice in the absence of the rule, it may show its programming for the 1970-71 season, the last before the rule became effective.

standard, possible relaxation to permit some use of "off-network" material as part of regular program series or for individual programs or short series, and others mentioned herein. We hope licensees will submit enough information to give an idea of the nature of the program as well as its title, in particular (except for network programs and the better-known syndicated programs) whether it is locally originated or syndicated, and the program type. The three networks are expected to indicate, as best they can at this point, what programs they would be presenting as network material in 1972-73 and later years, during the "access periods", if this time were available to them.

(b) What has been and would be the effect, in terms of the presentation of and demand for new syndicated or local programming (and on the incentive to produce such material) of one or more of the following:

(1) grant of waiver to stations in the top 50 markets to carry network news at the beginning of prime time without having it count toward the permissible three hours, if preceded by a full hour of local news.

(2) grant of waiver to the networks to present one-time news and public affairs programs without counting in the permissible three hours; on a more general exemption for programming of these types. 9/

(3) Change to a "21 hours a week" standard instead of three hours a night, either completely or partly, such as allowing a small amount of occasional deviation to "make up" network programs lost through preemption, or to clear a one-hour segment between news and network programs, or permitting flexibility within the 21-hour framework provided at least a half-hour of non-network material is presented each night

(4) permitting generally (or refusing to permit) sports "runover" waivers, for example games in the late afternoon running somewhat past 7 p.m. E.T.; or permitting presentation without limit of a small number of important events such as the Olympic games. 10/

9/ This question is regarded as particularly important because the availability of such material is an essential ingredient of broadcasting in the public interest, and at the same time diversity of viewpoints is also highly significant. Commenting parties are asked to indicate how much such material is available from non-network sources, or is likely to be in the future, and how this would be affected by our action here.

10/ We are particularly interested in what effect an occasional "runover", to the extent of 10 minutes or so, actually has on what the station presents in the following hour--whether it presents the same non-network programs it would have otherwise but simply "clips" them, or whether it substitutes other material, and if so what.

(5) Changes in Section 73.658(k)(3), including: (1) relaxing the "off-network" restrictions with respect to individual "special" programs or short series, or generally permitting as much as 25% of a series to be old material, or a considerably higher percentage such as urged by MCA, Inc. in RM-1929; and changes in the "feature film" provisions as mentioned in paragraph 41, below. 11/

(6) Providing that, as far as the Mountain and Pacific time zones are concerned, a program schedule will meet the rule if it complies with the three hour restriction in the Eastern and Central time zones.

(c) What non-network programming (syndicated or local), intended for carriage during the "access periods", will be available to stations during the 1972-73 season? We hope that program producers and syndicators, and station licensees as to local material, will give full and reasonably specific information in this respect.

(d) To the extent the basic concept of the rule -- limitation to three hours of prime-time network programming, and thus promotion of independent program sources -- is not working in optimum fashion to further the public interest, how would the situation be either improved or worsened by substantial liberalization of the "off-network" restrictions, for example as urged by MCA, Inc., in RM-1929?

18. Possible criteria for evaluating program "diversity" and similar matters. One of the primary purposes of the rule was to promote diversity of program sources and ideas (see paragraph 2, above). We therefore seek information on this subject, particularly how the rule works in practice in this respect. In addition to its general meaning -- the extent to which material is different from other material presented in the market currently or in the recent past -- this concept could have a number of different particular aspects:

(a) programming which is of a different type from most other programming fare, for example, the factual-fictional distinction made in the Wild Kingdom and Lassie decisions;

(b) the number of times, if any, that the exact same program has been presented in the market, at least in recent years, for example only once earlier on the network as opposed to two or more times;

(c) the length of time since its last presentation, for example, the "two years" test for feature films; and

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11/ See paragraph 48 below, concerning four recent decisions in the "off-network" area as to which parties may wish to comment.

(d) the extent to which the material, while never itself shown before, is simply a continuation of a series which has already run in the market (on a network or non-network basis) to the extent of hundreds of generally similar episodes. There are doubtless other specific aspects.

19. Another related but much more difficult matter is being advanced -- that of "program quality". For instance, MCA Inc. in its petition asserts that the non-network material being presented in the access period is "of shoddy and inferior quality." 12/ The Commission has traditionally, and wisely, eschewed the role of being a judge of the "quality" of programming. We therefore have great difficulty in evaluating this aspect of the present matter. Interested parties are of course free to submit -- and if they treat this subject at all, we hope that they will submit -- showings making objective points in this regard. We ourselves have not formulated any objective standards for making "quality" judgments, and do not now perceive the basis for doing so. Thus, factors such as ratings, comparative production costs, and critical favor (or lack of it), while obviously relevant to the issue, have never been regarded as reliably and objectively determinative of the issue of "quality" or what is "superior" or "inferior" program material. As indicated, parties advancing arguments along these lines are urged to do so on some kind of objective basis.

20. Economic data: effect on stations. 13/ As indicated above, one of the chief lines of argument against the rule is the asserted adverse economic effects on stations, perhaps particularly small-market stations and UHF stations (e.g., the two petitioners mentioned here, in intermixed markets). Initially, we stress that "economic injury" considerations are pertinent only where they have consequences significantly impairing licensees' ability to operate in the public interest. The Act does not guarantee any level of profitability.

21. There are certain problems inherent in attempting to get this type of information in public comments. First, to be of probative value, either economic data concerning impact on stations must include data for all stations -- the "universe" -- or it must include data from a representative and scientifically valid sample of that universe. There is no

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12/ Obviously, what is generally involved here is comparative quality, non-network "access period" material vis-a-vis the network material which would be shown then in the absence of the rule. This raises the question of what network programming should be used as a basis of comparison (for example, a good deal of it does not last as long as one season).

13/ The stations referred to here are not only, or even primarily, the stations in the top 50 markets which are literally covered by the rule. With the cutback in network schedules across the board, stations in other markets are affected also.

assurance that comments in themselves will provide either of these. Second, there is sometimes, and might be here, an understandable reluctance on the part of the licensees to "bleed in public", even if substantially impacted economically. Therefore, it is necessary to take steps to assure that the material in this area on which decision is reached is complete and valid, even if it means going beyond what is publicly filed. Also, of course, it is desirable to set forth certain guidelines with respect to material which is filed publicly, to make sure that it is complete and probative. 14/

22. The following provisions indicate what is expected of parties filing herein concerning the economic impact of the rule on their stations, and what may be required in addition to the comment material:

(a) Comments by licensees claiming adverse economic impact on their stations, if they wish to have their claims given serious consideration, must make a complete showing therein as to the "access periods", i.e., those periods when they presented non-network programs but would have presented network material if the networks had continued their 1970-71 prime time pattern: This shall include exact data as to revenues from network programming and non-network programs, and the costs of the latter (including outright costs,and transportation or other charges, if any), for the 9-month period from October 1, 1971 through June 30, 1972. If effect on the value of "adjacencies" is claimed, this must be accompanied by data as to how much was so received in 1970-71, and how much was in fact received, for the same 9-month period.

(b) Parties filing comments raising "economic injury" arguments need not necessarily show in their comments the complete picture as to the station's revenues, expenses, and profit or loss; but they must be prepared to file immediately after their comments, if it is requested, an FCC Form 324 giving this data for the 9-month period mentioned above. This will be handled subject to the usual provisions as to confidentiality governing Forms 324.

14/ An example of the type of problem which may arise in this connection is the petition by the Springfield, Mo. UHF licensee (RM-1935). This party set forth figures as to what it has lost in network compensation through the cutback ($112.50 weekly); and the costs for the non-network programming it has to buy instead ($172.50 in expenditures, plus $55 freight charge, plus $300 in commercial positions given for "barter" programs). On this basis, it estimated that the rule was costing it $640 a week, or over $33,000 a year. However, it did not state what revenue it receives from the sale of its non-network time during the access period, simply asserting that it has had a 26% audience loss for the 6:30 - 7 p.m. (C.T.) period, and that its revenues from the sale of this time on a non-network basis did not amount to recovery of the increased costs. Obviously, the material in the petition does not give a complete picture. This material was supplemented by petitioner and counsel after a Commission staff inquiry.

In general, commercial time given in "barter" programs is not properly includable as a cost item in this analysis, since it is reflected in the reduced revenue received for a non-network program when only part of the commercial time in it is available to the station to sell. However, stations may make a showing in this respect if they wish, since, if a substantial amount of the commercial time in a program must often be given to the program supplier, it represents an inherent limitation on the return which the station can expect from the program.

(c) At some point, it may be necessary to inquire of all commercial television licensees, or at least all of those which are network affiliates in markets having at least three stations, as to data concerning the financial effect of the rule on them. This inquiry, which would require clearance by the Office of Management and Budget, is not being instituted at this time, but may later be instituted this year if it appears necessary on the basis of the comments filed.

23. Economic data: the economics of program production and distribution. One of the most common lines of argument against the rule is that, with networking being a very efficient mechanism and much the cheapest way of distributing programming and supplying advertising support for it, any alternative method of program supply entails more money for distribution and less for production, and, therefore, lower quality, particularly because of the very high and increasing costs of such production. Related is the argument that, with these high costs and with the risks involved in the non-acceptance of programs by the public and station customers, the networks are among the very few parties who can afford the risks involved in production of good-quality material. These arguments were, of course, considered at length in the Docket 12782 proceeding which led to adoption and affirmance of the rule. We have no intention of instituting a new or long and exhaustive re-exploration of the subject. On the other hand, we would certainly welcome and take into account new data in this area, if offered within the time frame of this proceeding as indicated below.

24. We seek data on subjects like the following:

(a) What actually is the cost of producing "good-quality" programming, both network and non-network (syndicated or local) either per episode or total? (Figures in the previous record in Docket 12782 have contained a rather wide variety of figures).

(b) To what extent is program quality related to production cost, and, specifically, how (higher salaries for better people, more processing and therefore more technicians, etc.).

(c) What are the comparative costs of distribution of network programming and non-network syndicated material, and, with the latter, of securing advertising support for it?

(d) To what extent is it realistic to assume that there is a fixed sum of money available for the whole program-supply process, so that if more goes into distribution, less is available for production?

(e) To what extent do the higher costs and risks involved in non-network production and distribution (if they are higher) mean that prime time programming is going to be of a type cheaper to produce, such as so-called "game shows", rather than the material which has previously characterized prime time?

25. Economic data: effect on the program production industry and employment therein. As indicated in paragraph 2, above, a main purpose of the rule was to provide a healthy production industry, able to supply independent programming. One of the arguments against the rule is the assertedly depressing effect on the U.S. program-production industry. While the factual basis of such arguments is not always completely clear, it appears to consist chiefly of two actual or potential lines of development: (1) the substantial extent to which, to keep costs down, "access period" non-network material consists of material originating, or at least produced, outside the U.S.; and (2) the extent to which access-period non-network material is of a sort sometimes called "game shows" -- relatively inexpensive material similar to (often a continuation of) programs which have appeared on daytime television -- rather than the sort of material which is characteristic of network prime time television. Comments on this subject are invited.

B. Specific proposals on which comments are invited.

26. In the following paragraphs, comments are invited on specific proposals; under each topic, the proposals are set forth first, followed by a brief discussion of the pertinent considerations. Usually, they are on a "one or more" basis, i.e., one, or more than one, of the suggestions might be adopted if it appears in the public interest.

27. Initially, one point should be stressed. Putting forth a proposal for comment herein does not mean that the Commission necessarily has a view, even tentatively, that it should be adopted. It simply indicates our vidw that the proposal should be considered in light of the comments and data received in the proceeding. Further, on some of the matters, study may indicate the need for further, perhaps more specific, proposals; this is one reason why this is a "Notice of Inquiry". However, we have given notice herein of the "subjects and matters at issue", and therefore all interested parties are specifically advised that the Commission has the flexibility and discretion to adopt rule changes in the following areas if it finds that the public interest would be served thereby (with the exceptions footnoted below). 15/

28. Effective dates of changes. If rule changes are adopted, there is then the question of when they should be made effective, for example: (1) the usual 30 days or so after publication in the Federal Register, or (2) for the next season, starting October 1, 1973, or perhaps even thereafter. As to some minor changes, the first approach might well be appropriate; it appears obvious that major changes, or rescission, could not well be adopted before the next season (these would probably include matters such as a flat "21 hours a week" standard and modification of the "off-network" restrictions to or approaching the extent urged by MCA, Inc.). Comments on the appropriate dates of changes are invited.

15/ The foregoing discussion applies to the proposals set forth in this subsection B, which are, for the most part, in the direction of relaxations of the rule. As to other matters set forth below in subsection C, extensions of the rule in various respects or "exemptions" for certain types of programs other than news and public affairs, this is an Inquiry proceeding only. See also par. 49 in this subsection B.

29. Changes in the direction of a total or partial "21 hours a week" standard. Comments are invited on the question of adopting one or more of the first three following proposals, or, in the alternative, adopting the fourth proposal listed, going to a flat "21 hours a week" standard.

(a) Leaving the basic three-hour-per night formulation, but providing that stations may exceed that amount on one or two nights a month to the extent of a half-hour or an hour, provided they reduce network prime-time material a corresponding amount within the next 14 days.

(b) Leaving the basic three-hour restriction, but providing that stations may deviate from it (following notification to the Commission) where they regularly present some news at the beginning of prime time and desire to clear a following one-hour segment regularly for an hour-long local or syndicated program, and the only way they can do this and continue to carry desired network material is to exceed the 3-hour limit on another night. 16/ (see Hubbard Broadcasting, Inc. (KSTP-TV), 32 FCC 2d 594 (October 1971). The "21 hours a week" standard would apply in these cases.

(c) Providing that stations may adhere to a "21 hours a week" standard, but must continue to present at least a half-hour during prime time each night of material which is not network, off-network nor recently shown feature film.

(d) A flat "21 hours a week" standard. If this is to be adopted at all, it will not be before October 1, 1973.

30. The "21 hours a week" argument was one raised by several stations in waiver requests in 1971, in support of requests for waiver to exceed the permissible three hours on one night a week, accompanied by a reduction on another night. In general, this was rejected, although it was one of the considerations in grant of waiver in the Hubbard Broadcasting case cited. We similarly rejected the concept, for the future, in denying ABC's request for continuation of its waiver for Tuesday nights (American Broadcasting Companies, Inc., 33 FCC 2d 1038, March 1972).

16/ This is probably more of a problem in the Central and Mountain zones, where prime time begins at 6 p.m. rather than 7, than elsewhere. According to ARB February-March 1972 audience survey data, about two-thirds of the "top 50 market" stations in those zones carry news in the early part of prime time, compared to only about one-third in the rest of the U.S.

The reasons have been a belief that time should be available to non-network program sources on a regular basis, the same period each night or at least not varying from week to week, in order to encourage the development of such material, for example programming suitable for "stripping" in early prime time. Also, there was some thought that stations might simply fulfill their obligations under such a relaxed restriction on one "junk night", presenting all of their non-network material then and programming the remaining evenings with 3-1/2 hours or more of network material.

31. Nevertheless, there appear to be some considerations supporting this type of relaxation. First, it would increase licensee flexibility; as noted in the Hubbard decision, this appears to be the only way stations can clear time for a one-hour non-network program if they carry news after the beginning of prime time, and continue to carry desired network material. Also, it could be that adherence to a strict three-hour standard tends to discourage occasional pre-emptions of network programs for desirable local material, if the station is faced with the complete loss of the network program and perhaps even carriage of it by a competing station in the market (whereas, under a "21 hours a week" standard, the station could "make up" the program preempted on another evening). 17/ These are the thoughts behind the first two proposals above. Another consideration is that it might not be a bad thing for some of the cleared "access periods" to be later in the evening, since somewhat different types of programming might thus be presented and encouraged (see paragraph 57, below). Parties supporting relaxation along one or more of the lines indicated should give specific examples of situations where the present restriction is undesirable, if there are any; parties opposing such relaxation should indicate specifically why it is important to have time available on a regular basis, 18/ Another pertinent question in this connection is whether, whatever may be decided as to individual stations, the networks themselves should be permitted any deviation from a three-hour standard.

17/ This has come up largely in connection with local sports events, such as basketball, in which cases the station is probably going to go for the preemption, whether it can "make up" the network program later or must forego it entirely. However, there could be desirable local material for which the choice would not be so clear.

18/ One problem with adopting a flat "21 hours a week" standard is that there are a number of stations which regularly present less network prime-time material than that, most often where they preempt a network movie, or other network material on one evening, to present their own local movie. If these stations were permitted to apply this non-carriage to the whole week, it could result in their keeping very little time open for new non-network material. Comments on this type of situation are invited.

32. Other changes in computation of prime time network programming. Comments are invited on the adoption of one or both of two other changes in the method of determining the amount of permissible prime-time programming. The first change set forth below is designed to resolve automatically the situation prevailing in a few markets not observing daylight-saving time (presently Detroit, Grand Rapids, Indianapolis and Phoenix) during the portion of the year (late April to late October) when it is observed in the U.S. generally. This change is believed self-explanatory. The two changes are as follows:

(a) Providing that, automatically as a matter of rule, in the case of "top 50" markets which do not observe daylight-saving time, during the "daylight-saving time" part of the year (late April to late October) prime time will be moved back one hour, e.g., to 6 - 10 p.m. E.T. instead of 7 - 11 E.T., for these stations, corresponding to the local time at which network material is actually received in these places.

(b) Providing that, with respect to prime time network programming (or possibly other evening material also) any arrangement which complies with the rule in the Eastern and Cental time zones will also be acceptable for stations in the Mountain time zone, and possibly also the Pacific time zone.

33. The second change above is based on a suggestion by NBC in the recent proceeding (Docket 19475) in which we changed the "prime time" programming for the Mountain time zone to 6 - 10 p.m. M.T. NBC's suggestion was that stations in the top 50 markets in the Mountain zone be permitted to carry more than three hours of prime-time network material if the schedule of such programs in the Eastern, Central and Pacific zone meets the standards of the rule, so that the excess occurs only in the Mountain zone. This was adopted only in part in the Report and Order in Docket 19475 (24 R.R. 2d 1972, FCC 72-578, 37 F.R. 13622), with respect to situations where the network material that evening is live and simultaneous, such as a sports events, and where the station in the Mountain zone broadcasts no other network material during prime time (including "pre-game shows") the same evening. The Phoenix NBC affiliate, supported by NBC, has recently sought reconsideration of our refusal to adopt the entire NBC proposal.

34. While the change in "prime hours" to 6 - 10 p.m. M.T. will eliminate many of the problems which have arisen this past year (such as sports or movie "runovers" which occur after 11 p.m. E.T.), and others will be taken care of by the NBC proposal as adopted, it may be that further extension along these lines will be appropriate. Comments are invited on whether the Note to Section 73.658(k) adopted recently should be extended to include complete sports events where there has been a "pre-game show", or "runovers" of events which are not live, simultaneous material, such as movies. Comments are also invited on whether this principle should also extend to additional programming presented by networks on the same evening in the East before the particular event but which Mountain zone stations wish to present after the event. 19/ Comments are also invited on whether the same principle should be extended to the top 50 markets in the Pacific zone, not so much in connection with "runovers" (which are not a problem since the sports event occurs quite early) but for network programming presented before the game in the East but which these stations may wish to present after the game in the West (or material programmed especially for the West). 20/ The Commission does not have any views at this time as to whether changes along these lines should be adopted: we have recognized before the problems which stations in these time zones face in integrating "simultaneous" material into the usual pattern of delayed broadcasting which prevails there. One important consideration, here and elsewhere, is to what extent relaxation along these lines actually will impinge on the availability of prime time on these stations to non-network sources. Comments on this point are solicited. These are examples of changes that will be made at an early date if it appears that the public interest will be served thereby.

35. Rules designed to deal with sports event situations. One of the most common subject of waiver requests, and Commission consideration of them, has been in connection with sports events. The following rules are proposed to deal with these situations for the future; the first three below are alternatives, and the fourth, involving a somewhat different concept, is a separate matter which may be adopted with or without one of the others.

(a) With respect to "runovers" into prime time of late-afternoon events (and possibly also some events scheduled for prime time) putting the burden of accommodating the "runover" on the networks and stations in the carriage of network programming, by providing that if a late-afternoon event runs over into prime time (i.e., after 7 p.m. E.T., or 6 p.m. C.T.), network evening programs

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19/ See KOOL-TV (Phoenix, Arizona), FCC 72-735 (August 16, 1972).

20/ See Academy Award and Miss America programs, 33 FCC 2d 743, 23 R.R. 2d 987 (February 1972); and the waiver granted NBC affiliates on August 29, 1972 (FCC 72-782).

must simply start that much later, so as to leave a full hour for non-network material at the beginning of prime time (e.g., if the event runs until 7:10. the networks evening material could not start until 8:10). 21/

(b) Providing by rule that it is assumed that sports events will last no more than a certain time, and ignoring runovers beyond that time. (Comments are invited on what are appropriate time allotments for various types of events; it presently appears that 3 hours for baseball and football, and 2-1/4 hours for basketball. should be sufficient, at least in the absence of a "pre-game show" or post-game material). Comments are also invited on the matter of pre-game shows and post-game shows generally; to what should any assumed fixed period for sports telecasts permit these? We are presently of the view that it should be only in connection with games of unusual importance -- playoffs or championship games -- and not regular season contests, and not for more than 15 minutes (see our action of August 29, 1972, FCC 72-782, 25 R.R. 2d 228, granting waiver to NBC affiliates).

(c) Providing that if an event runs more than a few minutes over the allotted period -- say more than 5 minutes, or more than 10 minutes -- the network or its affiliate will have to "give back" a half-hour of time on some evening during the following few days.

(d) Designating by rule a certain number of unusually important sports events, which, along with related material, may be presented without observing the Section 73.658(k) limitations. These might include the summer and winter Olympics, the World Series, New Year's Day and other year-end bowl games, the Super Bowl, and possibly a few others; but we are certainly of the view that it should not extend beyond a small number of events.

36. Considering that sports events involving possible prime-time problems occur on only a limited number of days of the year -- probably no more than 50 for each network -- it appears that this subject may have aroused more concern, and required more action, than it is worth. It appears eminently desirable to adopt a definite rule, or at least an over-all policy, in this area. Comments are particularly desired on what actually is the impact from a relatively small and occasional "runover" on the availability

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21/ This type of scheduling, while unusual, is certainly not unknown, for example following Presidential messages early in prime time. It may be that this is the simplest way of dealing with the matter, particularly if the incidence of sports event "overruns" is as small as the networks say it is.

of prime time to non-network sources. In other words, what do stations do if the event runs until 7:10 p.m. E.T.? Do they simply carry the same material they would have carried if the event had ended at 7, "clipping" it slightly, or do they substitute other, shorter material, and, if so, what? One thing which should be borne in mind, also, is that while the networks often put their requests in terms of being able to carry the event to completion, this is not usually true. Rather, it is a question of whether, if they do, they may still carry their full complement of evening material. 22/

37. Relaxation of the "off-network" restrictions of the Rule. Comment is invited on the following changes in the "off-network" restrictions of the rule, contained in Section 73.658(k)(3). One or more of the first four changes in the "off-network" restrictions set forth below may be adopted, with or without the fifth, which is really a somewhat different concept. The possible changes are as follows:

(a) Providing that the "off-network" restrictions do not apply to material which was not part of a regular network program series, i.e., an individual "special" program or a small series of material, say no more than six programs; 23/ or providing that while the rule imposes a general restriction on all material, stations in the top 50 markets may present up to ____hours per year of off-network material coming in the above categories (comments are invited on what this figure should be).

(b) Providing that a "package" of material may be presented including some, but no more than 25%, or some smaller percentage, of off-network material (e.g., special Christmas programs in the "Lassie" or other series).

22/ The discussion here, except for the fourth proposal mentioned above, relates largely to the late-afternoon situations. Sports events actually scheduled for prime time do not raise any great number of problems, and it appears that these may be handled by adjustments in time-computation along the lines mentioned in pars. 32 - 34, above.

23/ The rule as adopted in May 1970 actually read in terms of excluding only material which was "off-network syndicated series programs." The change to restrict off-network material generally was made in the August 1970 decision on reconsideration.

(c) Providing that stations may present without restriction (or up to ____hours a year) of "off-network" material, provided the material itself was not shown on a network within a certain number of years (e.g.,5) and the series of which the particular material is a part has not been on the network for a less number of years (e.g., 2).

(d) Continuing the 1972 arrangement of considering waivers of this restriction, on an ad hoc basis, but providing for more orderly treatment, including public notice of such waiver requests, and more or less simultaneous consideration of all such requests well in advance of the year for which waiver is sought (e.g., requests would have to be in by March 1, 1973 for the 1973-74 season, and decision would be reached by May 1). Comments are invited on whether, if such an approach is to be adopted, a certain total number of hours of off-network material should be permitted, and if so, what that figure should be. 24/

(e) Adoption of a rule looking toward the type of relaxation urged by MCA,Inc. in RM-1929, permitting any off-network material to be presented as part of a package of which at least 25% is new material. We also raise the question of whether, assuming such a relaxation is to be made, a higher percentage of new material, e.g. 50%, should be required.

38. The "off-network" restriction is potentially one of the most troublesome areas of the rule. It represents, not the objective of the rule to lessen network control of television programming (which is taken care of by the basic "three-hour" limitation plus the "syndication" and "financial interest" rules) but, rather,that of protecting the newly "cleared" portion of prime time for access by non-network sources of program material. As such, it obviously serves a needed purpose; but, at the same time, it is also a significant restriction, including in its present form a bar on the presentation of some highly worthwhile material, sometimes -- as with "one-time" material, and probably short program series -- material which if presented during prime time would not have a very substantial impact on the availability of time to non-network sources. The latter was one of our chief reasons for the grant of waiver to the six-program Six Wives of Henry VIII series (Time-Life Films 35 FCC 2d 773). For this reason, we raise the issue of whether relaxation should be considered along the lines of the first two approaches set forth above, or, alternatively, approaches (c) or (d), which would probably mean more relaxation. As elsewhere herein, parties opposing relaxation are urged to discuss the impact and effect of any such relaxation, by rule or waiver, on the availability of prime time to non-network sources of new material, with specific examples of actual or potential preclusion.

24/ Parties may wish to comment on this subject in light of the four decisions referred to in paragraph 48 below, concerning "off-network" material, and on the matter of objective standards which might be appropriate in this connection (see paragraph 40).

39. Item (e), above, inviting comments essentially on the MCA request or a modification of it, represents a somewhat different concept: whether, in view of the very high cost of and asserted risk involved in producing new material, it might not be desirable to permit a "mix" of new and off-network programs in a package, and, if so, what percentage of new material should be required. Parties supporting such a change should discuss in detail the impact it would have on station purchase and presentation of truly new material

40. In connection with this subject generally, and particularly the approach set forth as item (d), above, comments should discuss to what extent the judgments involved here can appropriately reflect program quality determinations, and, if they can or must, what objective standards can be formulated in this connection so as to avoid subjective judgments. With respect to items (a) and (b), above, comments are invited on whether this type of exemption should be granted only in the news and public affairs area, and what is the availability of this highly important type of material from non-network sources.

41. "Feature film". Section 73.658(k)(3) also contains restrictions on the use of movies during the cleared portion of prime time; as the rule reads, there is an ambiguity as to whether a film previously shown as a network program is thereafter "an off-network" program, permanently barred from these hours, or is a "feature film" which can be used in them after two years from its previous showing. It appears that other changes may also be appropriate. Comments are invited on one or more of the following changes:

(a) Clarification of whether a movie previously shown on a network is an "off-network program" or a "feature film" for purposes of Section 73.658(k)(3), and which of these two alternative constructions would most serve the public interest. 25/

(b) Whether, in this respect, there should be any difference between movies originally made primarily for theatre exhibition, and those primarily made for television (e.g., treating the former as "feature films" but the latter as "off-network" programs); and if there is to be a difference, what test should be applied if there is any question (e.g., where the film first appeared).

(c) Whether it is really in the public interest and consistent with the basic objectives of the rule to permit during "cleared" time the use of feature films shown in the market as recently as two years ago, or whether instead this period of prohibition should be longer, such as five years, or perhaps permanently with respect to a previous showing on the station itself.

25/ If network-shown movies are to be treated liberally, comments are invited on a matter which has been raised: how can "feature film" be defined so as to prevent a high percentage of network entertainment programs being classified as "feature film" so as to get this more liberal treatment?

(d) Whether, on the other hand, in view of the economic structure of the film-buying business, the "two year" period should be shortened, say to one year, at least as to feature films bought by the station up to mid-October 1972 (this is essentially what is urged in a pending request by a Salt Lake City station).

42. Aside from the obvious desirability of removing the ambiguity mentioned, this subject presents some more basic considerations. As far as the presentation of an individual film is concerned, it probably makes little difference to the viewer if it appeared previously in the market as a network program or a locally shown film, or whether it was created for theatre showing or especially for television. From this standpoint a fairly liberal approach might not be inappropriate.

43. But there is also another consideration. The use of "feature films" during early evening hours by network stations in the top 50 markets has not up to now been great, averaging only about one hour per week per market of prime time according to ARB audience survey data for February-March 1972. However, there are some indications that this may increase, particularly if the Commission adopts a rather liberal view, so that stations in these markets will devote a considerably larger amount of time to such material. This would, of course, have an impact on the availability of prime time to other kinds of non-network material (local or syndicated). While the rule was not designed to promote any particular type or form of programming, it was certainly intended to promote new non-network material; and presentation of movies already shown looks in the other direction. Comments on this point are invited.

44. The same general considerations might also indicate a lengthening of the "two-year" period for any film, and particularly where the previous showing was on the station itself -- a situation in which, normally, there should be no problem in determining whether or not a given movie was or was not run in the past, even years ago. This was the reason for limiting the period to two years on reconsideration in August 1970. Comments are invited on whether it would be appropriate to bar permanently from the cleared hours feature films previously run on the same station, as well as on the desirability of lengthening the period generally. On the other hand, the point has been urged recently that the usual basis on which films are bought -- such as "five years and five runs" at a very high price -- almost automatically requires that more than one of the runs be in prime time, if the station is to be able to recover its investment. It is urged that therefore a lesser restriction should be adopted, as to the station's re-use of its own material. Comments are invited.

45. Exemption for regular network news following an hour of local news, and for one-time (or other) network news and public affairs programs. Comments are invited on adoption of one or more of the following, as a matter of rule or at least of fixed policy:

(a) Continuing for the future (and putting into the rule) the policy adopted for 1971-72, and recently for 1972-73, concerning a waiver for network news at the beginning of prime time where it follows a full hour of local news (e.g., from 6 - 7 E.T.). Under this policy, such network news does not count against the permissible three hours.

(b) Continuing, for 1973-74 and later years, the waiver or exemption granted for one-time network news and public affairs programs ("documentaries").

(c) Affording an exemption, for 1973-74 and later, for network news and public affairs programs generally.

46. As to the first matter mentioned, we have favored this policy. As we have noted, the broadcast of in-depth coverage of local news and problems, in major cities, is to be encouraged as definitely in the public interest; and, as a practical matter, stations can avoid the impact of the rule anyhow by splitting their news, so as to present a half-hour of local first, then network (e.g., at 6:30 p.m. E.T.), and then local against at the beginning of prime time. There appears no reason to require this "bracketing" form of scheduling as a matter of rule, although 19 stations in the top 50 markets do it (25 operate under the waiver). On the other hand, this does represent a substantial impingement into the availability of prime time to non-network sources; and comments should be invited at this time on whether this policy should be made permanent.

47. The second matter is perhaps more difficult. The rule contains an exemption for "special news programs dealing with fast-breaking news events, on-the-spot coverage of news events", etc., but not for news or public affairs "documentaries", although when the rule was adopted there was some thought that the exemption should be broader to include them. (See concurring statement of Commissioner H. Rex Lee in FCC 70-466, 23 FCC 2d 428). There is, obviously, a high degree of importance to the presentation of such material in quantity, for the better information of the audience, and, at the same time, diversity of viewpoints and sources is probably more important here than it is with entertainment programming which is the main thrust of the rule. There is also a practical consideration: a number of programs presented by the networks during 1971-72 year have involved partly "on the spot coverage of fast-breaking events", etc., but partly background material of a documentary nature; and without the waiver, network staffs, and the Commission, might be faced with a fairly knotty problem of what is "on the spot coverage", what are "fast-breaking events", etc. 26/ Existence of the waiver does serve in this respect to make life simpler. Comments on whether this exemption should be made permanent are invited, including, particularly, the matter of to what extent such material is available from non-network sources. Item (c) above requires little elaboration. As noted, the matter of a general exemption for this type of network material was considered at the time the rule was adopted, and has been raised again; in this general overview parties are free to comment on it.

26/ If an exemption or waiver policy for "one-time"network programs of these types (or more generally for such network material) is not adopted, it may well be desirable to adopt more definite standards as to what are programs falling within the exemptions now specified, for "on the spot coverage" and "fast breaking news events." Comments on possible standards are invited, for example a requirement that the program must contain a high percentage (e.g., 75%) of "live" coverage, or film shot within the last 24 hours, rather than being substantially background material.

48. Comment on waiver actions. Parties are invited to discuss certain waiver actions of the past year, including, particularly, the four involving "off-network" material (Wild Kingdom, Lassie, National Geographic, and Six Wives of Henry VIII), the ABC Summer Olympics decision, and the decision granting CBS waiver for one-time network news and public affairs material, or documentaries. We do not expect, nor require, that comment will be made separately on these matters; but rather that parties will discuss them in connection with specific changes in the rule, set forth above. They are set forth separately simply to call attention to them as problems which have arisen with the rule in its present form. Inviting comment on them does not represent a Commission view that they were wrong, but, rather, that to some extent they were reached on the basis of rather limited information, early or at least fairly early in the administration and application of the rule; and comment should be entertained before we decide whether the policies involved in these decisions (or the reverse of these policies, as some may argue) should be adopted as a permanent matter. 27/

49. Repeal of the rule. Repeal or rescission of the rule will be considered herein, for the reasons and subject to the limitations set forth in paragraphs 13-15, above. Parties may also wish to discuss--if they urge such rescission--alternative approaches to the problem of network control over television programming. As to the latter, obviously this is an Inquiry proceeding only.

50. The cumulative impact of the relaxations mentioned above. We have set forth above possible relaxations of the rule in a number of different area. It is realized that the various changes, if made in the different areas, might have a cumulative impact on the availability of prime time to non-network sources, even though the impact from some of them individually might not be significant. Comments on this aspect of the matter are invited, along with views as to which are the particular "problem" areas from this standpoint.

C. Inquiry into other possible changes in the rule (extensions of its scope, etc.

51. This portion of the Notice -- an Inquiry only, with changes along these lines to be adopted, if at all, only after further rule-making proceedings -- is designed to invite comments on some changes in the rule of a more fundamental nature than those mentioned in subsection B, above. As discussed in the following paragraphs, these include: (1) extensions of the scope of the rule, either as to time or as to markets covered;

27/ The citations to these six decisions are, respectively: Mutual Insurance Co., of Omaha, 33 FCC 2d 583 (Wild Kingdom); Campbell Soup Co., 35 FCC 2d 758, 24 R.R. 2d 856 (Lassie); Storer Broadcasting Co., 35 FCC 2d 889, 24 R.R. 2d 8[illegible] (National Geographic); Time Life Films, 35 FCC 2d 773, 24 R.R. 2d 849 (Six Wives of Henry VIII); American Broadcasting Companies, Inc. 35 FCC 2d 340 and 765, 24 R.R. 2d 628 and 862 (Olympics); and Columbia Broadcasting System, Inc., 32 FCC 2d 55 and (for 1972) FCC 72-906 (October 11, 1972).

and possibly extending the "off-network" and "feature film" provisions of the rule to independent stations at least in some circumstances; (2) Imposing certain requirements on stations as to use of the "access period", e.g., for local programming, children's or "minority group" programs, etc.; (3) exemptions from the rule to encourage the presentation of certain types of material on either a network or "off-network" basis (children's programs, etc.) 28/ and (4) changing the form of the rule so as to specify a definite hour as the "access period", which might be a later hour than the first hour of prime time which is now generally "cleared" under the rule as it operates in practice. Setting these concepts forth, and inviting comments on them, does not by any means represent a Commission view that they should be adopted, now or ultimately, and in fact some Commissioners have doubts as to whether some of them are either realistically feasible or otherwise desirable; but they have been suggested and appear to have enough relationship to public-interest objectives to warrant opportunity for exploration in this over-all proceeding. One other matter should be pointed out: as indicated elsewhere, we regard expeditious resolution of the present proceeding as highly important; and if the time frame established does not permit thorough exploration of the various concepts set forth in this subsection, that will have to wait until later, to the extent it is appropriate.

52. The following are the concepts on which comment is invited:

(a) Possible extensions of the scope of the rule.

(1) Limiting network prime-time programming to 2-1/2 rather than three hours per night, so as to clear 1-1/2 hours for non-network use (or at least providing for this in the case of stations presenting local or network news at the beginning of prime time, so that they would have a full hour cleared for other non-network material).

(2) Extending the coverage of the rule to markets beyond the top 50, possibly to all markets having three or more network-affiliated stations.

(3) Having the "off-network" and "feature film" restrictions apply to independent stations (or at least independent VHF stations), to the extent of one hour at least per night.

(b) Required local uses of the access period. A requirement that some (or conceivably all) of the cleared "access period" time be devoted by affiliated stations covered by the rule to certain types of non-network material; including:

(i) local "live" programming (comments are invited on whether this should be required to be actually "live" or could include filmed material treated as live under the Commission's Rules).

28/ This is the same type of concept involved in the general exemption for network news and public affairs programs set forth in subsection B, above.

(ii) programming designed for particular groups, such as minority groups (for example, the four specified in Section 73.680 of the Rules, and other "ethnic" groups), or children.

(iii) programming specifically designed to deal with the important problems in the station's community and coverage area as indicated by the licensee's survey to ascertain the needs, interest and problems of its community and area (generally this would be local material, but conceivably it could include syndicated programming of certain types).

(c) encouraging, by way of exemption from the rule's restrictions on network and "off-network" material, the presentation of the same general types of material mentioned in (b), above, (similar to the general exemption for network news and public affairs material covered under subsection B, above). Under such an approach, network or "off-network" material falling into these categories would not be counted for the purpose of computing the permissible amount of such material.

(d) Specifying a particular hour as the "access period", for example the third hour of prime time (9 - 10 p.m. E.T. and P.T., 8 - 9 p.m. C.T. and M.T.).

53. The first two matters mentioned above -- extensions of the rule either as to time or as to markets covered -- has been suggested by various persons largely on the basis that if "cleared time" in major markets is a good thing, why is not more such time in more markets even better? As to the matter of time, this of course would mean more prime-time availability to alternative program sources; in particular, for the stations which present news at the beginning of prime time -- about half of those in the top 50 markets -- it would mean a full hour of non-network programs. As to the matter of geographic extension, one specific suggestion has been made as follows: while access to major markets is almost indispensable to the success of syndicated material, general access is also significant. One index of the success of a syndicated program is a percentage figure, shown in ARB and Nielsen reports: the percentage of the nation's TV homes which are in the "areas of dominant influence" (ADI's) of stations carrying the program. It is said that, as a very rough rule of thumb, a program producer is justified in spending $1,000 per episode on the production of a program, for every percentage point the program has, or is expected to have. It is asserted that extending the "prime time access rule" would tend to increase this percentage figure somewhat, with respect to clearance in the smaller markets, and therefore would mean more production expenditure and -- perhaps, to some extent -- better programs.

54. As to independent stations, it is sometimes claimed that it is unfair for independent stations in the top 50 markets to be free of all restrictions under the rule, for example being able to present "off-network" material during prime time in unlimited quantity. This argument is particularly made as to VHF independents, most of which in the top 50 markets are profitable, and sometimes highly so. Comments are invited on whether the "off-network" restrictions should be extended to such stations, for example so as to require an hour of prime time each night to be devoted to material which is neither network, off-network, nor feature film recently shown in the market. Comments are also invited on whether such an extension, if adopted, should be only to VHF stations, recognizing the particular problems which UHF stations still have. 29/

55. The second general area of inquiry is whether the public interest would be better served by requiring certain uses to be made by stations of the non-network portion of prime time, for example local programming, children's programming, or programming of particular significance to minority groups or meeting important local problems. To a degree, perhaps, this represents a shift in emphasis away from the matters stressed in the Report and Order adopting the rule, particularly insofar as this would encourage local rather than non-network syndicated material. A number of parties have expressed the view that this would be a good idea, more in accord with long-standing Commission objectives. It warrants exploration here, for one reason because of assertions (by the rule's critics such as NBC in its petition) that the rule in its present form produces mostly continuations and revivals of network series, often daytime material such as "game shows", whose proliferation does not necessarily warrant encouragement. Comments on these concepts are invited.

56. The same general type of consideration is the basis for the third general area -- whether the presentation of certain types of programs should be encouraged, from network or "off-network sources, by granting them exemption from the three-hour limitation.

29/ It appears likely that such a change, if adopted, would not have any marked consequences. Probably few independent stations present off-network syndicated material for more than three hours of prime time, since usually a movie is inserted into the schedule somewhere during the evening. However, the movie would be subject to the "two-year" restrictions of Section 73.658(k)(3), if such a change were made.

Comments are invited on whether another change mentioned in above, specifying a particular hour as the access period, should be applied to independent stations.

57. The last matter mentioned above -- changing the rule so as to provide a definite, and probably later, cleared portion of prime time -- is one which has been suggested by certain syndicator parties. The argument is that, as the rule now works, the "cleared" portion of prime time is generally the first hour, 7 - 8 p.m. E.T., a time when the audience is somewhat smaller than it is later, and also when many children are watching. It is said that if the time were made later, such as 9 - 10 p.m., the audience would be larger, and, also, it would be more entirely an adult audience. The latter, it is said, would permit more "innovative" programming than that appropriate earlier, when a substantial part of the audience is young people. Comments are invited on whether such a change would be appropriate, and, if so, what form of rule could be devised to reach this result.

III SUMMARY

58. In view of the considerations set forth above, comments are solicited on the various matters mentioned, which in summary are the following:

(a) Gathering information as to the effect and impact of the rule and possible changes in it, particularly on the programming being and to be presented, and the economic consequences on stations (particularly in small markets) and the TV production industry, and the economics of program production and distribution. See pars. 16-25 above.

(b) To what extent -- in practice as well as in theory -- the rule promotes real diversity in program sources, program ideas, and programming itself. See paragraph 18 above.

(c) Possible adoption of a "21 hours a week" standard, or some partial move in that direction. See pars. 29 - 31 above.

(d) Other possible changes in computation of permissible programming during prime time -- a change to take care of the few "non-daylight saving time" markets, and a possible change to increase the extent to which programming arrangements acceptable for Eastern and Central time zone stations will be acceptable for Mountain and possibly Pacific, zone stations. See pars. 32-34 above.

(e) Rules to deal with sports events, in particular late-afternoon "runover" situations and "pre-game" shows; and also a possible rule listing a few important events (the Olympics, the World Series, etc.) which might be suitable for presentation without regard to the basic limitation of the rule. See pars. 35-36, above.

(f) Relaxation of the "off-network" restrictions; and modification of the "feature film" restrictions, in Section 73.658(k)(3), in the former respect to permit a limited amount of off-network material and, possibly, a rule to permit generally the use of off-network and

new material in a "package", along the lines urged by MCA, Inc. Clarification of the "feature film" provision, as to feature films shown as network material and feature films produced primarily for TV rather than theatre exhibition, is also proposed. See pars. 37-44 above.

(g) Continuation of waiver or exemption with respect to news and public affairs programs, after October 1, 1973: the waiver for network news following a full hour of local news, and for "one-time" network news or public affairs programs, or documentaries, or a more general exemption for this type of network material. See pars. 45-47 above.

(h) Repeal of the rule

(i) The possible cumulative effect of relaxation in various areas mentioned (par. 50, above).

(j) Possible extensions of the rule or further exemptions, as to which this is an Inquiry proceeding only. See pars. 51-57 above.

59. This Inquiry and Rule Making proceeding is instituted pursuant to authority contained in Section 403 and Sections 4(i) and 303(b), (g), (f), (i), and (r); 307(d); 308(b); 309(a); 313, 314 and 315 of the Communications Act of 1934, as amended.

60. Pursuant to applicable procedures set forth in §1.415 of the Commission's Rules, interested persons may file comments on or before December 22,1972,and reply comments on or before January 29, 1973. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken herewith. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice. For reasons stated in pars. 13 - 15, above, parties are herewith notified that the above time-table, which appears adequate, will be adhered to.

61. In accordance with the provisions of §1.419 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents shall be furnished the Commission. Material filed will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION *

Ben F. Waple
Secretary

* See attached statements of Commissioners Robert E. Lee, H. Rex Lee, and Johnson. The statement of Commissioner Hooks will be issued at a later date.

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

I concur in the Notice of Inquiry and Proposed Rule Making. I hasten to add that this should not be interpreted as dissatisfaction with the existing rule but rather as an opportunity to review it with the expectation that the objectives of the rule may be improved.

(In re Notice of Inquiry and Notice of Proposed
Rule Making Concerning Prime Time Access Rule)

CONCURRING STATEMENT OF COMMISSIONER H. REX LEE

I concur in the decision to initiate an inquiry into the effect and operation of the prime time access rule (Section 73.658(k) of the Commission's Rules) primarily because, as a general proposition, I favor an administrative agency's review of past regulation. However, my concurrence should not be interpreted in any way as either a repudiation of the rule or a prejudgment of the inquiry proceeding.

I would have preferred to delay the Commission's review of the prime time access rule in order to permit a more meaningful assessment of its impact during the current television season, i.e., 1972-1973, when the full force and effect of its provisions become applicable. Although I have no preconceptions about the use of prime time repeat material by the networks, as the majority decision indicates, there appears to be a relationship between the prime time access rule and television "re-runs." In fact, it is even suggested that "parties may wish to prepare their comments herein with this in mind." It seems to me that a more orderly course of action would be to consolidate the prime time access inquiry with an investigation into the ramifications of a limitation on network television "re-runs."

One other matter deserves consideration. At the time the Commission adopted the prime time access rule in 1970, I indicated that I was in favor of a provision which would have exempted news documentaries from the scope of the rule. It was my belief that failure to adopt such an exemption would tend to discourage the network presentation of news documentaries. I would hope that interested parties would comment on the validity of my earlier prediction in light of actual experience under the rule.

Network Power

[In the Matter of Consideration of . . . the "prime time access rule," Docket No. 19622]

Separate Opinion of Commissioner Nicholas Johnson
Concurring in Part and Dissenting in Part

In 1970, after years of investigation and analysis, this Commission concluded that the domination of the television program production market by the three networks required Commission action. As part of that action, the Commission required that television stations in the top 50 markets take no more than three hours per night from the three networks. At least one hour had to come from independent producers, including the stations themselves. For at least one hour per night, there would be 150 buyers of television programming (three network affiliates in each of so markets) rather than three networks.

In the words of the Commission:

> The public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming. Existing practices and structure combined have centralized control and virtually eliminated sources of mass appeal programs competitive with network offerings in prime time.
>
> In light of the unequal competitive situation now obtaining, we do not believe this action can fairly be considered "anti-competitive" where the market is being opened through a limitation upon supply by three dominant companies. 1/

In affirming the Commission's action, the U. S. Court of Appeals for the Second Circuit commented:

1/ Network Television Broadcasting, 23 F. C. C. 2d 382, 894-95 (1970).

> To argue that the freedom of networks to distribute and licensees to select programming is limited by the prime time access rule, and that the First Amendment is thereby violated, is to reverse the mandated priorities which subordinate these interests to the public's right of access. . . . The evidence demonstrates that despite the fairly wide range of choice available to licensees, they have consistently decided to limit themselves to one program source during prime time. Thus, while the rule may well impose a very real constraint on licensees in that they will not be able to choose, for the specified time period, the programs which they might wish, as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects--the general public. (emphasis in original).[2/]

Now this Commission is embarking on a new proceeding to examine the functioning of the prime time access rule, propose modifications of it, and to consider its demise. Since I would have followed a substantially different course, I am compelled to dissent.

At the outset, one should note the extreme handicaps under which this rule has functioned in the short time it has been in effect. First, the Commission substantially undercut it by permitting off-network material to fill the access time during the first year of the new rule. Second, roughly 75% of all requests for "waiver" of the rule have been granted by this agency. Third, the rule has never enjoyed unanimous support either here or in the White House. (Recently the trade press reported three sure votes for repeal of the rule.) The White House continues its partisan wooing of certain segments of the

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2/ Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 478 (2Cir. 1971) (footnote omitted).

Hollywood community and networks by promising favorable FCC action.

I hasten to add that I believe my colleagues when they say that no decision has been made, that the presumption favors retention of the rule, and that they are perfectly willing to listen to arguments as to why the rule should be retained and even expanded. And I believe they are going to be surprised by the degree of support the rule will command in this proceeding. I doubt that the rule will be scrapped, or that there will be a return to the status quo, and I will have more to say about this later.

Another difficulty with this proceeding is the relative lack of information and analysis before the Commission regarding the basic facts surrounding this rule. As I have said over and over again, I believe this Commission simply must have a policy planning and analysis capability to provide the information necessary for rational decision-making. I would have hoped that this agency might have an analytic capability for an ongoing analysis of the structure of the television industry. Instead, we rely on not very systematic splurges in the Delphi technique, and we usually ask only those who have an economic interest in a policy outcome. But with the understanding that what follows is scarcely better than speculation, I think it useful to examine the effects of the rule on the principal groups affected by it.

Consumers. "Consumers" is the economist's euphemisim for the viewing public. The quick and dirty analysis is that the apparent impact

of the rule viewers are watching less television, and watching stations other than network affiliates. Perhaps, one might argue that therefore, consumers are watching programs (or doing other things) that bring them less satisfaction than the network programs did, and that there is therefore a net loss of consumer satisfaction. This analysis neglects some very hard questions about changes in consumer tastes and preferences, as well as problems with comparisons of interpersonal utility preferences.* And the evidence to support it is ambiguous at best. Counter-balanced against it is some evidence of increased choice, and more local programming. There is apparently some evidence of less network news and public affairs, and children's programming being deferred to later in the evening.

Networks. The dollar and cents effect appears minor, except that ABC, which supports the rule, seems to have been helped competitively.

Top-50 market network affiliates. This group appears to be better off financially as a result of the sale of commercials in purchased programming, rather than the revenues from network programs.

Smaller market affiliates. The networks might have elected to program this group for their affiliates in markets below the top 50. They choose not to. As a result, these stations have been adversely affected, although less than might have been expected.

Independent stations. There seems no doubt that these stations have been helped, in that they are now competing on a more equal footing with affiliates.

Program producers. Those who produce programs for the networks have probably been hurt; those who produce independent programming have been helped. There seems to be more imported programming in prime time--for whatever reason. And the overall budget for program production may have declined as lower cost programming is produced and shown.

The FCC. The objective of the rule--deconcentrating the television program production market--seems to have been achieved, although the magnitude of that achievement in the scheme of things is in question. The administration of the rule has created endless headaches, and simplified FCC administration plays no small part in generating the present proceeding.

My own approach to this proceeding would have been to take a substantially different course. The majority is, in effect, conducting a "go-no-go" proceeding on a rule that is barely into a trial period. It sets rigid schedules for consideration, without knowing whether it or other parties are likely to be in a position to make a rational policy choice. The majority also apparently believes that it makes sense to consider a complete return to the network power situation that existed prior to 1970. Unless something has changed since 1970 in the basic competitive relationships in the television industry, I don't see how the Commission can return to that unsatisfactory situation. I see no evidence that such a change has occurred. The majority cites none.

Former Commissioner Cox, in his usual insightful way, predicted our current position when concurring in the adoption of this rule in 1970:

> If [the rule does not have the desired result], I think the networks and their affiliates may face even more drastic action. As indicated by its filings in this proceeding, the Department of Justice has serious concerns about the state of the market for television programming. If the Commission waters down its action here, or if the new rule does not in fact open up the market, then I think it possible that the Department will proceed under the antitrust laws to apply the policies developed in the motion picture industry to broadcasting. Or the Commission itself, if faced with the permanent prospect of a slowly constricting program production industry, may decide that the only alternative is to attempt some kind of detailed regulation of the networks' program practices.
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> * * *
>
> I therefore hope that, after a necessary period of readjustment, the rule we have adopted will generate a substantial flow of new programming for sale direct to stations and cable systems, without passing through the network selection process. If it does, I think we will have a healthier television industry. If it does not, then I fear that the industry may very well undergo very serious changes in form and character. 3/

There is an antitrust suit pending in California, which followed an FCC waiver of the prime time access rule in major part for the first year, combined with an FCC stay of other aspects of its action which remained in effect for about a year after the rules were affirmed in court. I am not sure it is cause for industry celebration that the FCC is considering

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3/ Network Television Broadcasting, 23 F. C. C. 2d 382, 427-28 (1970).

abandoning rules adopted to deal with a serious competitive problem.

I would not have turned this proceeding into a "go-no-go" rule-making, nor would I impose a rigid decision making schedule, when it is not know that the facts necessary for a rational decision are going to be available. And if the rule is to be abandoned, it must be replaced with a substitute calculated to meet the problem of network power, and designed to accomplish more than would be accomplished if the rule were retained. It was tor these reasons that I made certain suggestions to my colleagues for areas of inquiry to consider alternatives to the rule. Some were incorporated and I need not dwell on them. Many were not and I want to discuss them here in the hope they will generate thought and perhaps future consideration.

Some concern was expressed that a more thorough proceeding would be delayed. But surely a graduated set of response dates would permit all the majority seeks in terms of time schedule.

To intorduce the subject areas I believe warrant comments and inquiry, I should like to note some views expressed in 1970 , at the time the prime time access rule was adopted. In the only telling portion of his dissent, Chairman Burch, in an opinion joined by then Commissioner Wells, said:

> [R]ather than spending years on a rule of this nature, the Commission must concentrate on the obvious alternatives which have a different economic base and thus make a genuine contribution to diversity. These alternatives do exist and have not yet come to fruition.

> First there is subscription television, which has a different economic base and can present programming that is not necessarily designed for a mass audience and will still be economically attractive for an entrepreneur. There is cable casting, a technology which makes multiple channels available and which by its very nature changes the entire economics of programming. There is the noncommercial educational television system, which, with sufficient and appropriate funding, can make a tremendous contribution to diversity. 4/

Noble words and an inspiring program for Commission action. I might have endorsed it myself; it is certainly consistent with my oft-expressed preference for competitive solutions rather than regulatory ones. The statement seems to acknowledge that a serious problem exists. The only question is the best solution and how to bring it about.

But what has happened in the past two years? Subscription television, shackled with restrictions, is still non-existent, and the thrust of Commission policy is toward ever more stringent restrictions. Cable television is strait-jacketed in a policy born of a political deal calculated to blunt its promising competitive benefits--not to mention the morass of more than 1000 applications pending and stymied here. And public broadcasting is suppressed in a political power play and capture to which I heard no protest from the Commission majority.

4/ Network Television Broadcasting, 23 F. C. C. 2d 382, 416 (1970).

In each of these areas, the FCC abandoned any thought of a leadership position. I do not oppose the consideration of alternatives so long as it is not done as mere chicanery to effect delay and postpone solutions opposed by powerful interests.

If the problem, most broadly stated, is network domination, and if there is still interest in discussing alternatives, let them be considered. What follows are ideas. The majority refused even to include them in its notice. I neither support nor oppose them. But I do think they are worthy of inquiry.

(a) As an alternative means of increasing the number of buyers for television programming, and increasing the diversity of programming available to viewers, UHF stations (and vacant or unassigned UHF allocations) could be realigned into stations with significantly higher power, capable of serving wide regions, with the possibility of attracting audiences to compete with network affiliates, and the possibility of interconnecting them into a new network.

(b) Networks could be required to allow every station in the market to bid for network programming on a per-program basis, giving every station an opportunity to acquire network programming. Independent producers would also compete for station buys without having to face a fixed network affiliation for major stations in the market.

(c) Networks could be required to allocate their prime time programming on a pro rata basis among all the stations in the market. For instance if, there were six commercial stations in a market, and three networks each programming four prime time hours per night (84 hours total network prime time per week), no station could receive more than two network hours per night, or 14 hours per week. The economic benefits of networking would be spread among all stations in the market UHF and VHF alike. Independent producers would also have a prime time market comparable to networks. New stations coming on the air would have an assured source of programming.

(d) Networks could be required to program no more than 25% reruns per year. This question is directly related to issues and questions concerning the prime time access rule, and should be considered with it.

(e) Networks could be required to divest themselves of television program production facilities and talent agencies as well as any remaining syndication activities domestically or in foreign markets. This agency has apparently made an informal decision, never actually considered by the Commissioners, to do nothing about the Department of Justice suit against the networks, although arguments are being made that the subject matter of the suit is a matter within the FCC's primary jurisdiction. I dislike the continuing erosion of the FCC's power to affect the industries

it regulates, but certainly there is no more powerful argument for that erosion than inaction, or action that fails to meet public interest needs, whether it be under the Communications Act or the antitrust laws.

(f) A final alternative could involve a seeming strengthening of the networks' monopoly position in an effort to, in fact, reduce it. One of the oft-overlooked reasons for the "quality" of the BBC's programming is that it is not one network but two. Thus, the "opportunity cost" of putting on minority appeal programming is virtually eliminated. (Opportunity cost is an economists' expression for what you lose by chosing a particular course of action. When an American commercial network chooses to put on programming that does not maximize audience it not only loses the production costs of that program, it also loses the "opportunity" to make the much greater revenue that a mass appeal program would create.) If a diversity of programming is what is desired, that can be created by creating a monopoly as well as by eliminating one. For example, if a means could be found whereby an individual network not only could, but would be required to, program every station in a given market, the net effect might well be more diversity than that created by three networks, each trying to copy each other's efforts to attract the entire audience (and ending up with about one-third each). Mass appeal programming would undoubtedly go on one, two, or three of the channels. But even it would be counter programmed--that is,

sports on one, a movie on another, and so forth. And the remaining channels would undoubtedly be programmed with minority appeal programming of various kinds--in an effort to attract to television persons who would not otherwise be watching any television at all, and thereby increasing the total television viewing audience for the network. In exchange for this seeming monopoly advantage, we could require that no network could program more than one hour a day, or whatever, to reduce the barriers to entry into the networking business and increase the number of networks. If there were hours when no networks were programming at all, the proposal would, to that extent, create a market for the programming of independent producers as well.

(g) Networks or stations could be required to present a certain amount of material designed for particular groups (see section b, paragraph 52 of the majority Notice) or news and public affairs each night or each week as a condition to a recission of the rule.

These are ideas I believe relevant to any consideration of where the FCC goes with the prime time access rule. No doubt there are others. No doubt some could be rejected quickly once they were subjected to detailed analysis. I express no preferences for any. Each has a similar goal to that of the prime time access rule, however, to improve the competitive, free private enterprise functioning of the television program production market. Several alternatives approach

the problem from a wholly different direction than that of the prime time access rule.

The FCC ought to be in the business of freely exploring, analyzing, and testing the alternatives for the benefit not only of the viewing public but the industries and unions involved as well. Its refusal to do so prompts this dissent.

*"Utility perferences" is economists' jargon for describing the variety of tastes and desires of individual consumers. Any single viewer-consumer has his own preferences for television programming--as well as for a host of other ways in which he might spend his time. The difficulty arises when one tries to add together the preferences of large numbers of consumers to decide whether consumers as a whole are better off or worse off as a result of alternative sets of programming fare. Suppose the effect of the prime time access rule is to eliminate certain network programming and reduce the number of viewers watching any television program, or that different programs are watched than would be the case without the rule. Then, so the argument goes, the total consumer-viewer satisfaction is less than when the additional network programs were available. The problem with this analysis is that no one knows how much loss a viewer suffers by doing something other than watch television, or by watching one program rather than another. There is a question whether consumer satisfaction for individuals can be added at all. No one knows whether those viewers who stopped watching television, or shifted to other programs because of the prime time rule, are essentially indifferent to the change. Viewers who watch the programming that replaced network programming because of the rule may find the new programming greatly preferable to their prior alternatives. And even this analysis presupposes that television watching is a net consumer benefit. The viewer is not, of course, the consumer--he is the product sold by the advertiser (who <u>is</u> the consumer). Programming

is virtually irrelevant in such a market analysis. (Various forms of subscription television, by contrast, do turn the viewer into a market place participant in the program selection process.) Nor is television watching necessarily a benefit at all. See the Kerner and Eisenhower Commission Reports, the Surgeon General's Report on violence in children's programs, How to Talk Back to Your Television Set and Test Pattern for Living. Mason Williams has said, "I finally decided the best I could do for television was not at all." After observing the industry's insensitivity to the impact of programming and commercials on small children (during the FCC's children's television hearings) I was prompted to recommend legislation to Congress making it a felony for anyone to keep a television set receiver in a home containing children under the age of six. In short, I am not sure that "utility preferences" is a concept that can contribute much to our analysis of the prime time access rule. But as long as we give Nobel Prizes in economics for the idea, the least the FCC can do is to hear it out.

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FCC 74-756

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE PRIME TIME ACCESS RULE, SECTION 73.658(k) OF THE COMMISSION'S RULES	Docket No. 19622

FURTHER NOTICE INVITING COMMENTS

(Adopted July 9, 1974; Released July 17, 1974)

BY THE COMMISSION: COMMISSIONERS LEE, REID, AND HOOKS CONCURRING IN THE RESULT.

1. In this Further Notice, the Commission invites comments on various matters mentioned in the recent decision of the United States Court of Appeals for the Second Circuit, reversing in part the Commission's decision of January 1974 (Docket 19622) which made changes in the prime time access rule, Section 73.658(k) of the Commission's Rules.[1]

2. The Docket 19622 proceeding was an investigation of the rule and its operation, looking toward any necessary modification, whether the rule should be retained in its existing form, or abolished. In January of this year, the Commission decided the matter in favor of a number of modificatons,[2] and this decision was appealed to the U.S. Court of Appeals for the Second Circuit. The Court reached its decision in June,[3] and enjoined the changes made by the Commission from becoming effective before September 1975. All petitions [4] were otherwise dismissed without prejudice to their being brought again in light of any subsequent Commission decision. The Court did not remand the case to the Commission for further proceedings (except as to setting a new effective date) and did not give any specific instructions, but did say that it would be helpful for the Commission to reconsider what it had

[1] *Report and Order* in Docket No. 19622, 44 FCC 2d 1081 (1974).

[2] 44 FCC 2d at 1131.

[3] *National Association of Independent Television Producers and Distributors (NAITPD), et al. v. FCC*, Case Nos. 74-1168, 74-1283 and 74-1348, decided June 18, 1974. Reconsideration of the Court's decision has been sought by appellants Warner Bros., *et al.*, which automatically stays the Court's mandate until it is disposed of. However, in view of the need for expedition in this matter, we are proceeding with the issuance of this Further Notice. Further action herein is, of course, subject to any further Court action which may be taken.

[4] Petitions for review were filed on behalf of National Association of Independent Television Producers and Distributors (NAITPD); Westinghouse Broadcasting Company, Inc. (Westinghouse); Warner Bros., Inc. and Columbia Pictures Industries, Inc. (Warner and Columbia). Intervenors in the case were: American Broadcasting Companies, Inc. (ABC); CBS Inc. (CBS); National Broadcasting Company, Inc. (NBC); Time-Life Films, Inc. (Time-Life); MCA, Inc. (MCA); National Committee of Independent Television Producers (NCITP); and Samuel Goldwyn Productions (Goldwyn). Sandy Frank Co. (Sandy Frank) filed as Amicus Curiae and the Department of Justice filed on behalf of the Respondent United States of America.

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done, and mentioned a number of specific areas where the Court believed the Commission could have given greater or more precise consideration.[5]

3. Docket No. 19622 was a lengthy and complicated proceeding, with participation by some 63 different interested organizations and individuals, who filed extensive comments, and, in some instances, participated in an oral argument which lasted two days.[6] The Commission does not wish to burden these participants or other parties with re-doing what they have already done; therefore, where matters raised in this Further Notice have already received discussion, and conditions remain substantially unchanged, interested parties are encouraged to state their positions, and where possible, to refer the Commission to previous presentations. Where new issues or conditions have arisen, or where previously filed material requires amendment or updating, interested parties may file whatever materials they believe necesary for the Commission to deal with the questions raised in this Further Notice. Also, as discussed below, we welcome comments from groups and individuals of the character mentioned by the Court, such as minority groups and consumer groups.

4. Essentially, the purpose of this Further Notice is to invite comments—hopefully more than repetition—on the specific matters mentioned by the Court and also from the kinds of groups and individuals who the Court appeared to believe had not been sufficiently heard from in this proceeding. In light of these comments, we will carefully review our decision. But the material filed in response to this Further Notice (or filed earlier and referred to by parties now) will be thoroughly considered and our decision reviewed in light of it. As a result of this inquiry, our decision could remain essentially unchanged, the original rule could be retained, some resolution between these alternatives could be reached, further modifications could be made resulting in less "cleared" time, or conceivably the rule could be repealed.[7] Whatever the Commission decides regarding the substance of the rule, the question of the effective date must also be considered, and therefore, comment is also invited as to the date each of the possible alternatives should become effective.

MATTERS MENTIONED BY THE COURT'S OPINION

5. The Court stated that the Commission may wish to take advantage of the additional year to reconsider its changes in the rule,[8] and

[5] These recommendations for further inquiry from the court are considered in greater detail in paragraphs 5–13, *infra*. The matter of the effective date of the rules is discussed in paragraph 4.

[6] A compilation of participants is contained in Appendix B of the *Report and Order*, 44 FCC 2d at 1150–1152.

[7] Of the six specific points as to which the Court expressed the view that further exploration would be helpful, three are matters primarily urged in the proceeding by Warner Bros. and similar opponents of the rule as reason for its repeal (some of whom were appellants before the Court). The three points are: Network dominance has been increased by the rule; the lessened production activity resulting from the rule has had an adverse "impact on Hollywood;" and the rule has resulted in more commercial advertising during the access period.

[8] The changes made in the January 1974 decision were: (1) removal of all restrictions from Sunday (the networks planned to program four hours of prime time starting this fall); (2) removal of all restrictions from the first half-hour of prime time (7–7:30 p.m. E.T., etc.); (3) tying "cleared" access time specifically to the 7:30–8 p.m. E.T. period Monday–Saturday; (4) providing that one of these six "cleared" half-hours may be used for network and off-network children's "specials," documentary or public affairs programming (the networks had planned to make considerable use of the Saturday half-hour for these kinds of programs); and (5) barring feature film from the access half-hours.

mentioned certain particular matters as to which it suggested further consideration or exploration. Three of these are economic matters (the network-dominance argument mentioned in footnote 7, the effect of the rule on competition, and the "impact on Hollywood"); and the Court suggested also that we seek the views of groups who had not previously participated to a great extent, mentioning in this connection three other matters: Television advertising, as to which consumer groups might be helpful; the character of programming with respect to minority needs (as to which minority groups might be consulted); and "playwrights and actors on the effects of the rule on their professions." (The list was said to be neither binding nor exclusive.)

6. *The rule and network control or dominance.* The first matter which the Court believed the Commission should consider further was the question of whether the justification for the rule in 1970–71—as a means to lessen network domination of prime time television—is valid in practice. The Court cited arguments made by Warner Bros., and a statement contained in a report of the Commission's economist,[9] to the effect that the rule had actually strengthened the position of the networks. The Court indicated that the Commission's finding that such arguments were "somewhat speculative"[10] may not be enough, stating:

> The Commission might accept an opposing view or formulate its own conclusions, so long as it fully explains its reasons for so doing.[11]

Parties may wish to submit factual, comparative and current, data as to prices charged advertisers by networks, prices the networks pay producers for programs, the extent to which any differences in these respects result from the rule (rather than other factors such as inflation), the extent to which the network-owned stations buy syndicated programs as a group and such sale is necessary to a program's success, and the present and past extent of station preemptions of network prime time programs (with some indication as to whether any decline is attributable to the rule or to other factors such as longer network programs).

7. *Effect on competition.* The Court noted that the Department of Justice had not participated in Docket No. 19622 until the time of the review by the Court, when a brief was filed which stated that the modification of the rule "represents . . . a serious weaking of its basic purpose . . .," to reduce the threat to diversity in broadcasting represented by the concentration of programming control in the three television networks.[12] The Court went on to state that the national policy favoring competition is one the Commission should consider, that the views of the Department of Justice would be relevant, and that the Court's review would be facilitated if the Commission would solicit these views.[13]

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[9] *The Economic Consequences of the Federal Communications Commission's Prime-Time Access Rule on the Broadcasting and Program Production Industries*, by Dr. Alan Pearce (September 1973). Page 1.

[10] 44 FCC 2d at 1140–41.

[11] *NAITPD, et al* v. *FCC*, footnote 8, *supra*.

[12] *NAITPD et al* v. *FCC*, Brief for the United States of America, p. 2. The Department of Justice went on to say, however, that the Commission had acted within its statutory powers, had considered the relevant factors and made a rational decision. The Court stated that the Department's brief does not give any factual basis for the argument that the rule works to lessen network dominance, and does not show awareness of the Commission's economist's statement.

[13] *NAITPD, et al* v. *FCC*, footnote 3, *supra*.

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8. We will solicit the views of the Department of Justice on this question, and invite comments from other parties on it. The Court did not specify what is meant by the rather general term "competition"; it is obvious that the matter has a number of different aspects which parties may wish to discuss, including: (1) competition among producers and distributors of programs and types of programs (bearing in mind the extent to which prime time network and first-run syndicated programming respectively tend to represent the output of a small number of producers); (2) competition among stations, e.g., network affiliates and independents; (3) competition among business enterprises generally to the extent that the rule facilitates local and regional advertising rather than advertising by large national concerns; and (4) the general "competition" among programs and ideas for the attention and education of the public.

9. "*Impact on Hollywood*" *and employment in production and distribution.* The final economic question raised by the Court is the effect of the Commission's decision upon employment patterns in the United States program production industry, or the "impact upon Hollywood." The Court found the Commission's lengthy discussion of this question and the conclusions thereon [14] "ambiguous" and requested a more decisive statement from the Commission on whether this is a legitimate matter of concern for the Commission, what the impact of the rule is upon domestic program production employment, and how this impact is evaluated in the decision.[15]

10. Of the various areas mentioned by the Court, this is perhaps the most difficult, which, if required to be pursued in its entirety, might well preclude any decision within a reasonable period. We are not prepared at this time to answer the threshold question of relevance. Parties may wish to comment on this question and on the factual content of the subject; it is hoped that those discussing the facts will deal with:

(a) the number of persons involved in producing network and first-run syndicated programs of various types and lengths;

(b) the number of persons involved in network and syndicated program distribution and in network and individual station sale of the access time involved.

(c) the number of persons involved in *local* program production to the extent locally produced programming is increased under the original rule and under the revised rule.

(d) the extent to which use of foreign-produced material is increased under the rule (original or revised) and the impact of any such increase on U.S. production activity and employment.

11. *Views of other groups.* The remaining matter which the Court believed the Commission had not paid sufficient attention to might be called the views of the unrepresented. The Court stated that the Commission has a fundamental obligation to further the *public* interest, particularly when the question has broad impact on the public by directly affecting what millions of Americans watch each night on

[14] 44 FCC 2d at 1141 and 1157–1161.
[15] *NAITPD, et al* v. *FCC*, footnote 3, *supra*.

their television sets, and that the Commission's decision was too much a compromise among opposing private interests. While not holding the Commission's efforts insufficient as a matter of law, the Court suggested that the Commission could have done more. The Court recommended that the Commission consult consumer groups and others on the effect of the rule on increased amounts of advertising on television during prime time; minority groups on the impact of the rule on programming for minorities; and writers and actors as to the effect of the rule on their professions. It was said that these were only suggestions, and not to be considered a binding or exclusive list.[16]

12. Although not noted in the Court's opinion, there was participation in this proceeding by entities of these categories—three "public" groups and two minority-group members appearing for themselves but concerned with minority problems.[17] Actors and playwrights participated to the extent they were represented by Screen Actors Guild and Writers Guild of America West, whose participation the Court noted. The views of these parties were carefully considered, although, as far as the "public" and minority-group parties were concerned, their views were not discussed as such in our January *Report and Order* (the discussion related to similar views of other parties elaborated at greater length). As the Court noted, our decision also took into account public reaction in another respect—feelings of parents, teachers and children that the rule resulted in an undesirably late start for children's "specials."

13. We invite and solicit comments from parties of these types, and the public generally, concerning the merits of the rule and, in particular, the following three subjects particularly mentioned by the Court:

(a) Views of "consumer" groups, and viewers generally, concerning the amount of advertising on television during the access period, compared to what would be presented if network programs were being carried instead. As indicated in paragraph 9, above, parties are also invited to comment on a matter which is to some extent the other side of this question—the benefit of increased opportunity for local and regional advertisers to present their messages during prime time.

(b) Views of minority groups, and minority-group members, concerning access-period programming as compared to network programming, particularly in relation to meeting the needs and interests of minority groups.

(c) Views of those creatively involved in the program production process—including actors, playwrights, musicians and other performers—concerning the impact of the rule on their professions and opportunity therein.[18]

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[16] *NAITPD, et al* v. FCC, footnote 3, *supra*.

[17] The three public groups—American Civil Liberties Union, National Citizens Committee for Broadcasting, and Action for Children's Television—supported the original rule; the two minority-group individuals opposed it, and the Guilds and other Hollywood labor organizations opposed it and urged its repeal. The SAG minority committee participated in the oral argument, opposing the rule.

[18] To the extent that such persons are represented by guilds such as SAG and the Writers Guild, they have already participated and may do so in this manner again. However, AFTRA did not participate earlier, and individual expressions from such persons are also welcome.

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CONCLUSION AND OTHER MATTERS

14. To summarize the foregoing comments are invited as follows (subject to the *caveat* in paragraph 3, above, about referring to, rather than repeating, material already submitted):

(a) by interested parties on the subjects mentioned in paragraphs 6 to 11 and 13, above: (1) the rule (original and as modified) and network control or dominance (paragraph 6); (2) the rule (original and as modified) and competition; the views of the Department of Justice are particularly sought (paragraphs 7–8); (3) the effect of the rule (original and as modified) on employment in the production industry and in broadcasting, including persons creatively involved in the production process on their professions and opportunities (paragraphs 9, 10, and 13); (4) the date of effectiveness of any of the various possible resolutions (retaining the modified rule; returning the original rule; some intermediate resolution between these two possibilities; further modification resulting in less "cleared" time; or repeal of the rule, as well as the matters specifically mentioned above.

(b) by entities other than those having a direct economic interest in this proceeding—e.g., consumer and public groups, minority groups, and members of the public—concerning the merits of the original and revised rule generally.

15. Time for comments and effective date. In order to remove the existing uncertainty as quickly as possible, the Commission is persuaded that a decision should be reached early this fall. Accordingly, we are allowing slightly more than five weeks for comments and two weeks for replies, in order that a decision may be made promptly. Considering the extent to which the various aspects of this general subject have already been explored, with participation by many of the parties with a direct economic interest, these periods appear sufficient. No extensions of time beyond the dates set herein are contemplated.

16. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules interested persons may file comments on or before August 16, 1974, and reply comments on or before August 30, 1974. All relevant and timely comments and reply comments will be considered by the Commission before action is taken herein. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

17. Section 1.419 of the Commission's Rules requires that an original and 14 copies of all comments, replies, pleadings, briefs, etc., shall be filed with the Commission. This requirement will apply to the principal parties directly involved in this matter, such as the court appellants and intervenors, the networks, station licensees, etc. However, in the interest of facilitating comment from the viewing public, the 14-copy and format requirements will not apply to letters and other expressions from individuals. Such comments will be considered and placed in the docket. Also, the rather substantial material already filed herein should not be filed again, but incorporated by reference. Material

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filed will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its headquarters in Washington, D.C. and also at the office of the Commission's Office of Network Study.

18. This further proceeding is instituted pursuant to Section 1.401 of the Commission's rules, and authority contained in Section 403, and Sections 3 (p), 4(i), 303 (b), (g), (i) and (r), 313, 314 and 315 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Consideration of the operation of, and possible changes in, the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules.	)	Docket No. 19622

PETITION FOR CLARIFICATION OF
NATURE OF INVESTIGATION

1. The National Association of Independent Television Producers and Distributors requests clarification of certain fundamental matters of law, policy and procedure, whose resolution appears vital to preparation of a meaningful fourth round of comments on the subjects of competition, network prime time dominance and Hollywood unemployment as requested in the Commission's July 17, 1974 Further Notice Inviting Comments. For the reasons stated hereafter NAITPD requests that the Commission clarify its further notice in the following respects:

1. By specifying whether, why and with what the Access Rule's originally controlling objective of creating competition has been replaced; or if it has not been abandoned, whether, why and to what extent it has been qualified, modified or supplemented (See paragraphs 2-5, infra);

2. By specifying whether and how any remaining indirect network influence over the programing of access time could conceivably be diminished by returning any part of that time to direct network control (i.e., by specifying the relevance to this proceeding of data relating to the manner and consequences of the syndicated program purchasing practices of network owned and operated stations) (See paragraphs 6-7, infra);

3. By specifying whether and how network misuse of network monopolized time can be controlled by increasing the amount of network monopolized time rather than by regulating existing network monopolized time; or network dominance of network monopolized time can be studied without reference to such direct symptoms as network ownership of multiple licensees, network contract provisions concerning facilities rental and network contract renewal options (See paragraphs 6, 8-11, infra);

4. By specifying the extent, if any, of Commission jurisdiction to base regulatory judgments on their effect upon Hollywood employment patterns; the scope of the subject so designated; and its relevance, if any, to the present proceeding (See paragraphs 12-15, infra);

5. By specifying, in light of the resolution of the foregoing requests, what areas the Commission itself will investigate; what areas it deems more appropriately dealt with by adversary comments; and how the two procedures [illegible]est be scheduled to complement each other;

6. By present specification that the effective date of any rule changes will be no sooner than the commencement of the first full season beginning at least sixteen months after final Commission decision or, in the event of appeal, at least six months after final issuance of an appellate mandate affirming the Commission; or, in the alternative, by present specification of an effective date which is wholly independent of the nature and timing of any substantive rule changes ultimately adopted. (See paragraphs 16-17, infra).

2. Effect on competition. In faulting the Report and Order [1/] adopting the evening programing requirements, the Court placed

1 / Report and Order: Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, 44 F.C.C. 2d 1081, reconsideration denied, F.C.C. 74-458, released May 2, 1974, reversed in part and remanded sub nom. NAITPD v. F.C.C., 2d Cir. Case No. 74-1168, decided June 18, 1974.

heavy emphasis on the Commission's failure to consider the possible detrimental effect of its rule revisions on competition, which the original Access Rule had been designed to encourage.[2] While the Further Notice responds to this judicial concern by soliciting comments, there is nothing in the Further Notice's treatment of the subject of competition which suggests that further comments can cure the relevant deficiencies in the Report and Order. On the contrary, insofar as the Further Notice admits confusion as to the relevant meaning of the word "competition" (paragraph 8), it is also admitting confusion as to the central purpose of this whole proceeding. When the Access Rule was adopted, its objective was "to provide opportunity -- now lacking in television -- for the competitive development of alternate sources of television programs so that television licensees can exercise something more than a nominal choice in selecting the programs which they present to the television audiences in their communities."[3]

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2 / In this connection, as the Further Notice recites (paragraph 7), the Court noted the Justice Department's argument on appeal that the modified rules "seriously weakened" the pro-competitive effect of the access rule and urged the Commission to solicit and consider the views of the Department in any further proceedings.

3 / Report and Order: Network Television Broadcasting, 23 F.C.C. 2d 382, 397, reconsideration granted in part and denied in part, 25 F.C.C. 2d 318, affirmed sub nom. Mt. Mansfield Television, Inc. v. F.C.C. 442 F.2d 470 (2d Cir. 1971).

When this proceeding was initiated in October, 1972,[4] its putative purpose was to evaluate the success of the Access Rule in achieving that Commission formulated and judicially approved objective.

3. Somewhere along the line, however, there crept into the proceeding the notion that not only the achievement but also the legitimacy of that objective was in issue. While the legitimacy of the rule's original objective was never expressly questioned (except facetiously by Chairman Wiley at oral argument[5]), the Report and Order also never specifically makes the evaluation of the rule's success in achieving its objective to which the proceeding was presumably addressed. Indeed, while partial retention of the rule is at least implicitly based on its success or potential success in achieving competition, its partial revocation is based not on failure to achieve this objective but on the Commission's newly expressed desire to achieve other and much more specific objectives, none of which was originally an objective of this rule and all of which necessarily involve

4 / Notice of Inquiry and Notice of Proposed Rule Making: Operation of and Possible Changes in, the Prime Time Access Rule, 37 F.C.C. 2d 900 (1972).

5 / See Transcript of Oral Argument, page 401: "Perhaps we should rewrite the rule and go back and rewrite the objectives."

diminishing competition by reducing the amount of cleared time. 6 / To the limited extent that the Report and Order does address the issue of the rule's original objective, it reflects indirectly the same confusion as the Further Notice candidly concedes. 7 /

4. In short, because the Commission had somewhere lost its assurance of what it seeks to achieve through the access rule, the Report and Order did not even attempt to evaluate all of the data available from the first three sets of comments. Thus what the Court presumably looked for in seeking further Commision study,

6 / See e.g. 44 F.C.C. 2d 1081, 1134 where the conditional return of one weekly hour is found warranted because it would encourage presentation of network public affairs, documentary and children's programs. While this is unquestionably a laudable goal, the Report and Order never explains what rational relationship it bears to the Prime Time Access Rule, since that rule neither related to how the networks use their time nor required them to clear the only time they thereupon decided could be used for these three categories of programs (at least not until the very same Report and Order legislated clearance of 7:30 daily).

7 / Thus, for example, in commenting on the advent of programs from new sources (44 F.C.C. 2d 1081, 1139) the Report and Order attempts a nose count of the number of prime time producers whose shows appeared on the air before and after the rule but never reaches a result because it cannot decide either whether access time or all prime time is the relevant time period or whether producers of first run syndicated material or all producers are the relevant entities.

especially in the competition area, was a clear statement of where the Commission was going from a regulatory point of view and how the changes it proposed (or any others it now adopts) further that goal.[8] While parties can now and have already commented on how the present rule achieves the original objective of increased competition, the Further Notice offers no guidance as to whether that objective is even still the controlling one.

5. At least inferentially it seems clear from the Report and Order that a new objective has been added: the encouragement or discouragement of specific program types and formats. Clarification of this point is crucial since insofar as the Report and Order ultimately based any of its conclusions or rule changes on program quality, it was effectively illegitimizing the original objective because those conclusions and rule changes invariably were in the direction of diminishing competition by expanding use

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8 / And insofar as lack of data in any category does present a problem, its absence is probably not curable by inviting further comment, since it could have been offered the first time. One prime example of this type of information, adverted to in the 1972 Notice but never mentioned since, is statistical information on the economic effect of the rule on stations. Only a small number of stations commented and those mostly ones who faced special individual problems. As the 1972 Notice suggested, the only realistic way to get really competent overall data is for the Commission to request it. In this way complete statistics can be had; the confidentiality of such data can be preserved by making it public only collectively; and comments can then be addressed to the significance of the facts instead of to opinions about what the facts are. Similar treatment might well be indicated for programing data.

of network programs on the (usually ambiguously stated) basis that network programing -- at least in these areas of at these hours -- was superior to syndicated programing. While needless to say it remains an issue for the Court whether such specific program quality judgments by the Commission are in any context permissible rulemaking criteria, the Commission itself must in the first instance explain how it will resolve the dilemma of a Report and Order which on the one hand endorses the Access Rule because it successfully achieves its stated pro-competitive objective, and on the other hand partially revokes that rule because the monopoly's 30 year headstart in program development leads the Commission to prefer its product. It is for the Commission to declare which of these two conflicting objectives is to control. But if it is to be encouraging programs the Commission prefers then the Commission must make clear to commenting parties how and why the very same rule can and should be the instrument for both discouraging and encouraging network production. And in clarifying its criteria, it is also requested that the Commission clarify the function of comments and indicate what other complementary data gathering methods are to be utilized in order

that parties not waste their own or the Commission's time and resources by attempting the irrelevant, the redundant or the impossible.

6. The rule and network control or dominance. The proposed inquiry into this subject apparently seeks to determine two different kinds of things: 1) whether networks still indirectly exercise control over access time if and because O & O program purchases are made as a group and are important to the success of syndicated programs and whether and how, if so, such a matter relevantly affects the form or operation of the rule; and 2) whether an absolute monopoly can meaningfully be subjected to comparative analysis and if so, what such an analysis reflects about network behaviour in network prime time before and after the Access Rule, the causal relationship between such behaviour and the rule and the propriety of regulating that behaviour through manipulating the rule rather than taking direct action.

7. The question of network dominance of access time through station buying practices raises two threshold problems whose resolution is prerequisite to meaningful comment. First, insofar as concerns station buying patterns, this is an absolutely objective matter rather than one of opinion or perspective. And there is

only one obvious, direct and logical way to ascertain all the facts: Commission inquiry of licensees, not adversary comment by other parties. The second problem is essentially one of relevance. Assuming for the sake of argument that all O & O groups buy all access programs commonly (needless to say a false assumption), how is this relevant to the question of the rule's success or failure? If it happens because the O & Os are the strongest affiliates in the strongest markets and therefore buy the strongest access shows does that affect the answer? And if all other commonly owned stations also buy commonly does that matter? If the networks are manipulating their O & Os into what would (if so) be dereliction of their licensee duties of individual program selection for each location is that relevant to this proceeding or to the license regulation of O & Os? If networks manipulate syndicators through manipulating O & Os and thereby to some extent determine the success of certain syndicated shows is that a problem and if so is the problem addressed by allowing the networks directly to control the time themselves or by regulating the networks' relationship to their O & Os? And even more fundamentally, is there any analysis whereby the indirect efforts of a former monopolist to manipulate a market in which it is no longer directly involved can be deemed

more anticompetitive than the absolute control which that free but arguably manipulated market replaces? The questions could go on, but the point is that absent any explanation of whether and why this matter is relevant to the objectives of the Access Rule or subject to control in any case through the form of the Access Rule, all the Further Notice can elicit is still further comments on various parties' opinions of the facts and how in their view those facts might be relevant to the issue as they define it. That is needless, wasted and useless to the Commission's deliberations.

8. The question of how networks express their absolute domination over the remaining three hours they monopolize raises similar questions: What are the facts (a matter which the Commission is best suited to ascertain)? Are the facts wholly, partly or not at all attributable to the Access Rule? Is what the networks do with network time really relevant to the Access Rule in any case? Even if there is a causal relationship between the Access Rule and various problems occurring in network prime time, can or should those problems be dealt with at all, (e.g. should or may the Commission insure advertisers

against the law of supply and demand or should they buy access time from stations if they can't afford network time?), can they be dealt with through the access rule and (Warners' ultimate argument) does it cure the problem of a monopoly "misusing" its absolute contol over 75% of the market to offer it 100% or do you rather limit the "misuse"? And even if enlarging the monopoly's market did de facto restrain its use of that absolute power, would not such a cure in this case simply recreate precisely the situation on which need for the Access Rule was initially premised (i.e., can network misuse of monopoly power be curbed by its increase and even if it can, is "restrained" monopoly for 4 hours rationally definable as a better way to create competion than a one hour free market and a 3 hour "unrestrained" monopoly)?

9. Insofar as concerns network dominance of network time there are also fundamental definitional problems. First, dominance is comparative, therefore insofar as network benefits are matched by benefits to others in the equation, network benefits cannot be defined as increased dominance. Thus for example if networks made more money and so did stations and so did syndicators, networks did not benefit relevantly. And second, dominance implies

some lack of option on one side. Thus for example if networks have more leverage over producers of network programs this is not "increased dominance" if those producers at the same time were permitted but declined to enter the syndication market for the very same 25% of prime time whose loss increased network leverage the rest of the evening. And in any event can the network be meaningfully described as dominating producers more than it did before because producers compete for 25% less availabilities when in fact the network itself has by the same token been given 25% less choices it can make? 9 /

10. Moreover, if, as the Further Notice suggests, this proceeding is to reopen the question of network use of network time, it is manifest that whether or not the Access Rule is relevant, it is less relevant than any number of other matters which cry out for a Commission investigation. Three of the most obvious such other matters are the network facilities rental contracts with producers, as noted by the Commission itself in oral argument; the option clauses in network program licenses whereby networks may cancel every thirteen

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9 / In fact, it would appear that the only possible losers in this equation are the networks, since everyone else affected by the tighter situation prevailing in network prime time remains free to operate also in access time. However, according to the "Pearce Report", even the networks may in a sense benefit from a necessarily more restricted market by deselection of their weakest program - a possibility suggested by their increased ratings since the rule. (And if this hurts those who produced the weak shows, does that hurt or help the production industry generally and/or the public?)

week but producers only at the end of seven or ten years; and the implications of network ownership of multiple numbers of licensees (a matter which the Further Notice itself inferentially cites as relevant to the Access Rule in its reference to group buying practices). It is inconceivable that the issue can be resolved solely by reference to a factor, the Access Rule, whose influence, if it existed at all, could only be tangential and indirect. However, the direct factors, only exemplified by the three matters cited above, are enormously complex and ill suited to "investigation by comment."

11. Accordingly, NAITPD suggests the propriety of a threshold judgment by the Commission, either on the existing record alone or on the record as supplemented by limited comments, as to the relevance of the argument even if its factual premise is correct, before facing the need to open up in this rulemaking the vast issues whose study would otherwise be required. Only if the Commission then concludes that network domination of network prime time could constitute grounds for alteration of the Access Rule (as opposed to grounds for a separate proceeding addressed to other, more direct ways of dealing with that issue) need comments be requested

on the matter; at that time, if it comes, their appropriate parameters can also be made clear.

12. "Impact on Hollywood" and employment in production and distribution. The Further Notice's discussion of this issue (paragraphs 9-10) both concedes that its enormity could "preclude any decision within a reasonable time" if "required to be pursued in its entirety" (paragraph 10) and declines to rule on whether such a pursuit is either permissible or relevant (Id.). With respect to the impact issue, there remain outstanding at least the following major questions: 1) has the Commission any jurisdiction to base a regulatory action upon that action's negative or positive effect on Hollywood and if so what are the sources and limits of that jurisdiction; 2) what is the proper scope of the subject, a question whose existence the Further Notice recognizes insofar as it asks a number of specified "sub-questions" in paragraph 10; 3) what is the relevance of the answers to these questions to the larger issue of the efficacy of the Access Rule in achieving its fundamental objectives; 4) to what extent can Hollywood employment patterns during operation of the Access Rule be traced to the effects of the rule itself and to what extent to the choice of the most powerful producers

not to enter the syndication business (yet) because they prefer to produce for networks (at least until Act V of their effort to defeat the Access Rule); and 5) if it still matters, what are the answers.

13. The Notice does not allude to the question of jurisdiction, indirectly notes the existence of a definitional problem in setting up its four topics for comment, and states that the Commission is presently unprepared to rule on "the threshold question of relevance." Insofar as adversary comments can assist the Commission in resolving either the four threshold law and policy questions or the ultimate question of fact they have already been sought and given, both in response to the original Notice and in the supplementary comments of July 1973, addressed solely to this subject. The matters which remain unresolved -- jurisdiction over the subject, scope of the subject, its relevance to the rule's objectives and its causal relationship to the rule's operation -- are all matters to be resolved by the Commission as a prerequisite to considering the factual data. If these questions are not now ripe for Commission resolution, however, as the Notice states, then it is also not yet time for investigation of the factual data, not only because they may prove irrelevant but also because their utility

would depend on their presentation being keyed to the answers to the preliminary questions of law and policy.

14. Moreover, here, as in the area of dominance, even resolution of the legal and policy questions does not facilitate meaningful comment because this area, as the Commission's inability to resolve the original comments demonstrates, is quintessentially one wherein the Commission must either take the investigatory initiative or decide -- wholly without its usual background of experience and expertise -- simply to believe one of the conflicting voices claiming to bear the truth. It might be noted, however, that absolutely no one in the industry -- not unions, not majors, not networks, not syndicators -- in fact ever can know the whole answer here, or the program industry would be far less beset by strife and misunderstanding. Thus it seems that if the Commission wishes to enter this area, the most productive way is through the hearing procedure followed in the original access proceeding, [10] since this question covers the whole country (and indeed the whole world -- i.e. foreign programs) and the whole

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10 / For a summary discussion of the proceedings which underlay the Commission's decision to adopt the Access Rule see Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 473-75 (2d Cir. 1971).

industry of program production as well as those of local broadcasting and local, regional and national advertising. Indeed, as the Commission apparently already suspects (See paragraph 10), this "one" matter may be bigger than was the whole original Access Rule inquiry. And since the basic goal of the Access Rule was to diversify program sources during some part of prime time it does seem that more easily available indicants might suffice to determine whether it is doing so.

15. Here, then, as with the dominance area, it is NAITPD's request that the Commission make a threshold judgment, either on the existing record (in this case fairly extensive as to at least the issues of jurisdiction and relevance) or on the existing record as supplemented by limited comments, as to the several above mentioned questions of law and policy before facing the need to open up this rulemaking to the extent otherwise required. Again, as with the dominance issues, only if and when those issues are so resolved as to require further inquiry, need the Commission determine either how to investigate the factual questions or where still further comments would suitably fit in.

16. Effective date of rule changes. While the terminal date of these further proceedings (even without reference to any of the

matters herein raised) is in fact wholly unprecedented, this matter is so central to the workings of the industry that the Commission's handling of it so far has both been solely responsible for its defeat in Court and the determining factor in virtually every disapproved aspect of the Access Rule's operation to date, inasmuch as everything which has been produced and purchased since the rule became effective has been produced or purchased on the assumption that the Access Rule may well be gone the next season. Yet the Further Notice specifically promises to continue precisely the same uncertainty, limited only by the (unmentioned) holding of the Court that 16 months notice is a minimum requisite. 11 / While it is manifest that so long as partial or total rule revocation continues a daily probability, the matter of effective date alone is insufficient to replace chaos with stability, it is at least a first step and a first step which can be taken without regard to the resolution of any other question raised either in the Further Notice or the other portions of this petition.

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11 / Since the Further Notice does not mention it, even this may not be known to many affected parties who were not involved in the litigation and may therefore not realize that no rule change now made could become effective prior to the 1976 season (unless it were to be made effective without reference to seasons at all), with the result that actions will continue to be based on the "here today, gone tomorrow" theory which has ever eaten at the vitals of the rule.

17. Accordingly, NAITPD requests that at a minimum and without reference to its action on the remainder of this petition, the Commission act first; separately and contingently to resolve the question of effective date of any and all changes in the rule so that this matter cannot again act both to confuse the substantive issues under concurrent consideration and to harm the public and the parties indiscriminately and from the outset. To this end NAITPD proposes that any change in the present rule be made effective no sooner than at the start of the first full season commencing at least sixteen months (the time held reasonable by the Court) after issuance of an unappealed final Commission order; or in the event of appeal, at the start of the first full season commencing at least six months after issuance of an appellate mandate affirming the Commission. Such a schedule would permit effectuation of any rules, whenever adopted, at the earliest time held lawful by the Court, while at the same time obviating any repeat of a proceeding which went on to some uncertain future date while all parties postponed decisions which should have been made, for fear of injury from a wrong guess. Moreover, it would guarantee that syndicators could do what the Commission has so far both invited and prevented -- commit to program production of something taking more time and

more money than they can afford to lose through bureaucratic fiat instead of just through the whims of the marketplace or their own misjudgments.

CONCLUSION

For the reasons stated above, the National Association of Independent Television Producers and Distributors requests that the Commission clarify its July 17, 1974 Further Notice Inviting Comments in the manner indicated in paragraph 1, supra.

Respectfully submitted,

KATRINA RENOUF

Renouf, McKenna & Polivy
1532 Sixteenth Street, N. W.
Washington, D. C. 20036

July 22, 1974

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FCC 74-875

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES, IN, THE PRIME TIME ACCESS RULE, § 73.658(k) OF THE COMMISSION'S RULES	Docket 19622

MEMORANDUM OPINION AND ORDER CONCERNING CLARIFICATION

(Adopted August 1, 1974; Released August 9, 1974)

BY THE COMMISSION:

1. The Commission here considers a "Petition for Clarification of Nature of Investigation" filed on July 23, 1974, by the National Association of Independent Television Producers and Distributors (NAITPD), following the issuance of our Further Notice Inviting Comments in this proceeding (FCC 74-756, released July 17, 1974). NAITPD requests clarification of "certain fundamental matters of law, policy and procedure, whose resolution appears vital to preparation of a meaningful fourth round of comments on the subject of competition, network prime time dominance and Hollywood unemployment" as invited in that Notice. Six points are mentioned.

2. In our judgment, for the most part this petition must be denied. What is sought largely (and entirely in the first three points) are expressions by us on certain questions of a rather conceptual nature—e.g., what the objectives of the rule are now in relation to what they were originally (and, if changed, what are the new objectives), the relevance of such matters as network-owned station group purchasing of programs and the networks' asserted greater dominance over the remainder of prime time (and whether these can be any justification for returning prime time to them), the relevance of the "impact on Hollywood" consideration both legally and in relation to the rule's basic objectives, etc. Further discussion of these matters at this point is neither necessary nor appropriate. We have dealt with them to some extent in our January Report and Order herein, and do not regard it as appropriate to do so again—thus in effect writing another Report and Order—until after review of the further comments to be filed. NAITPD, and other parties who have participated extensively in this proceeding before, no doubt have definite views on the questions set forth in the Further Notice (or believed to flow from the subjects set forth there) and can formulate them without help from us at this stage.

3. Some further observations are appropriate with respect to the "impact on Hollywood" matter, which is a difficult area both because of the "threshold question" of relevance (or our authority to consider)

and because of the great difficulty an exhaustive effort to get exact facts would entail. As stated in the Further Notice, we are not prepared at this point to pass on the "threshold question" (which conceivably could turn on the nature of the facts as to the degree of impact). We believe that the subject can be explored factually, to an extent sufficient for the purpose of this proceeding, in the time allotted for comments. For example, NAITPD's long-standing members include producers of game shows and variety shows, who should be able to supply readily information as to the numbers of persons and payroll typically involved in the production of such programs. Other parties should be able to give similar information as to dramatic programs (both network and those produced for syndication), and similarly station licensees should be able to give data as to the numbers of persons involved in the increased local programming efforts which have occurred.

4. NAITPD also requests a statement (particularly in the last connection, but also generally) as to what the Commission's staff will investigate, and what it will leave to commenting parties. This is a matter within the Commission's discretion, to be decided in light of what is necessary or appropriate. If commenting parties have any particular relevant data they wish to have the Commission consider, they should present it.

5. *Effective date.* NAITPD urges that, in the interest of some degree of certainty in the industry, we specify now an effective date for whatever rule changes may result from our further decision herein. Its position is that the Court has held that, at least as to any change involving a reduction in "cleared" time compared to the present rule, the period between decision and effective date must be at least 16 months. It asks us to state that we will not put such changes into effect until the start of a season (September) at least 16 months after decision or six months after appeal and affirmance.

6. Since this is one of the matters set forth in the Further Notice for comments (par. 4), it would be premature and inappropriate for us to set forth any final view at this time. We point out that, as mentioned before, it is our intention to issue a decision herein expeditiously so as to relieve the uncertainty involved as soon as possible.

7. In view of the foregoing, IT IS ORDERED, That the "Petition for Clarification of Nature of Investigation" filed on July 23, 1974, by the National Association of Independent Television Producers and Distributors, IS GRANTED, to the extent of the foregoing discussion, and in all other respects is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

September 20, 1974

Honorable Richard E. Wiley
Chairman
Federal Communications Commission
Washington, D.C. 20554

Re: FCC Docket No. 19622: In the Matter of Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules.

Dear Mr. Chairman:

This is in response to your letter of July 19, 1974, regarding the prime time access rule, Docket 19622, which solicits the views of the Department of Justice on some of the effects of the rule and of the modifications the Commission's January decision made in it, in terms of network dominance and competition.

The prime time access rule, initially adopted May 4, 1970, grew out of very long-standing Commission concerns with respect to undue concentration of control over television programming by the three nationwide networks, and extensive studies as to how the Commission might alleviate this continuing problem to some degree. [See Report & Order, Competition and Responsibility in Network Television Broadcasting, 23 F.C.C. 2d 382 (1970)]. The rule's essential aim was to open up at least a small portion of evening television time to competition among present and potential independent program sources. In adopting this rule, the Commission hoped to foster some greater degree of diversity of programming available for television broadcasting.

While the Commission was considering the adoption of rules to accomplish these purposes, and subsequent to their adoption, the Department wrote to the Commission indicating that the goal of these rules was generally in accord with the overall objectives of the antitrust laws in seeking to maintain and enhance competition in all aspects of television broadcasting. [Letters from the Assistant Attorney General,

Antitrust Division, to the Chairman, Federal Communications Commission, dated July 15, 1970; April 22, 1969; and July 14, 1966.] It was our belief that the prime time access rule, if afforded a reasonable chance to work, could be an important first step in fostering the emergence of diverse, independent program sources and curtailing undue network program control.

Thereafter, however, the prime time access rule never had a chance to become a stable element in the broadcast regulation environment. Adopted May 4, 1970, the rule was to be fully effective October 1, 1971. Four months after its adoption, however, the Commission on August 7, 1970, significantly amended the rule, delaying until October 1, 1972, the effective date of the off-network and feature films provisions. [25 F.C.C. 2d 318 (1970) Appendix I]. On October 26, 1972, only twenty-five days subsequent to the revised rule's fully-effective date, the Commission initiated a further rule making proceeding concerning possible modifications, repeal, or extension of the rule. [37 F.C.C. 2d 900 (1972)]. In January, 1974, the Commission substantially amended the rule. [44 F.C.C. 2d 1081 (1974)].

The Court of Appeals refers to certain evidence suggesting that overall network power has been strengthened, not weakened, by the prime time access rule. (Slip Opinion, pp. 4268-4269). This might be an important competitive conclusion, if correct, and if the rule had been afforded a reasonable period within which to work. We would suggest, however, that empirical evidence is not yet reliable in this matter and that all the relevant factors have not been adequately examined. Competitive policy and the Commission's responsibilities under the public interest test must be directed to long-term effects. The simple fact is that empirical evidence now available does not seem entitled to great weight in the present circumstances, since the prime time access rule was never given an opportunity to work. Until it is, there is no possibility of determining by empirical evidence what the resulting competitive relationships are.

Such an unstable rule simply did not give independent producers any reasonable opportunity to develop and successfully market programs for the prime time access period. Generally more than one season is necessary to plan programming and offer it profitably. Excessive and rapid changes in marketing prospects are likely severely to retard the development of an independent program production industry even if they do not entirely prevent it. Therefore, if this type of rule is to be used, Commission

assurances are needed which will permit independent program producers to proceed with confidence that marketing prospects in the future will be reasonably stable. Recently, the Commission endorsed proposals for the long-term funding of public broadcasting as desirable for necessary advance program planning. See Testimony of Commissioner Robert E. Lee Before the Subcommittee on Communications of the Senate Committee on Commerce on Long Term Federal Financing of Public Broadcasting, August 6, 1974. Analagous considerations appear to be applicable here.

While it is too early to determine whether the original prime time rule is in fact likely to produce its intended results, we believe considerations of fairness dictate that it be given a decent opportunity to work or not. The Department, accordingly, recommends that the Commission restore the original prime time access rule as initially formulated and that it accompany this action with an announcement that it intends to let the rule remain in effect for a suitable period, perhaps five years. Such a time period should be adequate to permit not only the development of any new independent production capabilities but also of any necessary supporting services, such as syndication, promotion, and financing. Upon completion of such a trial period, the Commission would have available an extensive basis of empirical information sufficient to measure the success of its objectives.

We recognize that the Commission's responsibilities under the public interest standard of the Communications Act are not the equivalent of the responsibilities of the Department of Justice under the antitrust laws. Our comments, therefore, are not intended to indicate that we will refrain from taking such action as is consistent with our responsibilities. In fact, as you know, the Department has pending and is actively prosecuting against each of the three national networks, antitrust suits aimed at opening up what we believe to be an anticompetitive market structure in network television programming. The relief sought in these antitrust cases is not dependent upon what the Commission does in this proceeding. Both do, of course, seek to promote competition in television programming and to diminish network dominance in that field.

Upon reviewing the filings herein, the Department may wish to make further comments.

Sincerely yours,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

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REVISION November 15, 1974 - B

COMMISSION ISSUES STAFF INSTRUCTIONS IN PRIME TIME ACCESS PROCEEDING
(DOCKET 19622)

The Commission has instructed its staff to prepare a decision adopting new provisions for the prime time access rule.

Under the new provisions, which would become effective September 1, 1975, television stations in any of the top 50 markets in which there are three or more operating commercial television stations would not be permitted to broadcast network programs offered by any television network, or programs previously offered by any television network, for a total of more than three hours per day during prime time--7 - 11 PM local time (6 - 10 PM in the central and mountain time zones).

The following categories of programs, however, will be excluded from this limitation:

1. Special news programs dealing with fast-breaking news events, on-the-spot or related coverage of news events, and political broadcasts by or on behalf of legally qualified candidates;

2. Regular network news broadcasts when immediately adjacent to a full hour of continuous locally produced news programing;

3. Runovers of live network broadcasts of sporting events where the event has been reasonably scheduled to conclude before the beginning of the restricted time period, the event has gone beyond its expected duration due to circumstances neither foreseeable by, nor within the control of, the network;

4. Network broadcasts of an international sports event (such as the Olympic Games), New Year's college football games, or any other network programing of a special nature, other than motion pictures, when the network devotes all of its own time on the same evening to the same programing, or all of it except brief incidental "fill" material; and

(over)

5. Network or off-network programs designed for children and public affairs programs or documentaries.

Definition: Documentary programs are defined as "any program which is non-fictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program."

The Commission expects to issue its final decision, which will elaborate on these points and will cover additional points, before the end of the year.

Action by the Commission November 14, 1974. Commissioners Wiley (Chairman), Hooks, Quello and Washburn, with Commissioner Reid concurring and Commissioners Lee and Robinson dissenting.

- FCC -

FCC 75-67

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

29756

In the Matter of	)	
	)	
Consideration of the operation of, and possible changes in, the prime time access rule, §73.658(k) of the Commission's Rules.	)	Docket No. 19622

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 16, 1975; Released: January 17, 1975

By the Commission: Commissioners Wiley, Chairman; Lee and Reid concurring and issuing statements; Commissioner Robinson dissenting and issuing a statement.

Introduction

1. In this Second Report and Order, the Commission decides the form of the "prime time access rule" (§73.658(k) of the Commission's Rules). The substance of the various provisions of the rule, to be effective in September 1975, is set forth in the next paragraph; it will be noted that it is similar to "PTAR I", the original rule adopted in 1970, except for certain exemptions which largely represent waivers regularly granted under that rule, new provisions as to use of feature film, and an exemption for network or off-network programming which is: (1) programming designed for children; (2) public affairs programs; or (3) documentary programs. In paragraph 62, below, we discuss the future of the rule. Also, in paragraph 60, below, we set forth our view, that the public interest requires stations subject to the rule to devote a substantial proportion of prime time to programming of particular local significance.1/

1/ We do not consider at this time, nor discuss further herein, the "anti-multiple exposure" rule proposed by Sandy Frank Program Sales, Inc., a syndicator, under which no more than one program of the same series could be broadcast each week during access time by a station subject to the rule. Such a rule, which if adopted would mean considerable change in the operation of many stations, is outside the scope of this proceeding.

2. In substance, the provisions of the new rule, effective September 8, 1975, are as follows (text is set forth in Appendix A):

(a) Network-owned or affiliated stations in the 50 largest markets (in terms of prime time audience for all stations in the market) may present no more than three hours of network or off-network programs (including movies previously shown on a network) during the hours of prime time (7-11 p.m.E.T. and P.T., 6-10 p.m. C.T. and M.T.).

(b) Certain categories of network and off-network programming are not to be counted toward the three hour limitation; these are generally:

-- Network or off-network programs designed for children, public affairs programs or documentary programs.

-- Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or other material related to this coverage, and political broadcasts by or on behalf of legally qualified candidates for public office.

-- Regular half-hour network news programs when immediately adjacent to a full hour of locally produced news or public affairs programming.

-- Runovers of live network coverage of sports events, where the event has been reasonably scheduled to conclude before prime time .

-- For stations in the Mountain and Pacific time zones, when network prime time programming consists of a sports or other live program broadcast simultaneously throughout the United States, these stations may schedule programming as though the live network broadcast occupies no more of their prime time than that of stations in the other time zones.

-- Broadcasts of international sports events (such as the Olympics), New Year's Day college football games, or other network programming of a special nature (except other sports or motion pictures) when the network devotes all of its evening programming time, except for brief "fill" material, to the same programming.

(c) Another provision includes definitions of the terms "programs designed for children" and "documentary programs".

I. Background and Description of Comments. 2/

3. The prime time access rule, §73.658(k) of the Commission's Rules, was originally adopted in May 1970, and, with some modifications adopted later that year, went into effect October 1, 1971, as far as the basic restriction on prime-time network programming was concerned. The restriction on use of off-network and feature film material during the time cleared of network programs went into effect October 1, 1972. 3/ This rule, "PTAR I", provides that stations (network-owned or network-affiliated) in the 50 largest U.S. television markets may not carry more that three hours of network programs each evening during the four prime time hours (7-11 p.m. E.T. and P.T., 6-10 p.m. C.T. and M.T.); and that the one hour thus cleared of network programs may not be filled with off-network material or feature films shown by a station in the market within the previous two years. The rule contains an exemption for network programs which are "special news programs dealing with fast-breaking news events, on-the-spot coverage of news events and political broadcasts by legally qualified candidates for public office." The May 1970 decision also contemplated waivers of the rule generally in two other types of situations, which have been granted since: (1) where stations carry a full hour of local news or local public affairs material immediately before prime time, and wish to carry a half-hour of network news at the beginning of prime time without its counting toward the permissible three hours; 4/ and (2) sports runovers, where a network telecast of a sports event normally would conclude within the allotted time but possibly may not. This matter arises chiefly with late-afternoon sports events scheduled to last until 7 p.m. E.T., but also sometimes occurs with respect to evening sports events. While not specifically mentioned in the decision adopting the rule, there has also been in effect since 1971 a waiver for one-time network news and public affairs programs, those not part of a regular series. Waivers have been granted since early 1972 for particular off-network programs (Wild Kingdom, National Geographic, etc.). There have also been waivers to take into account time zone differences. In a few cases,where requested by individual stations, waivers have been granted to permit use of 3-1/2 hours of network or off-network material in one evening if accompanied by a reduction in such material on a later night soon after.

2/ For a longer discussion of the background of this matter, see the January 1974 decision in Docket 19622, modifying the rule, pars. 4-25, 44 FCC 2d 1081, 1082-1092.

3/ See Report and Order in Docket 12782 (May 1970), 23 FCC 2d 382, and decision on reconsideration (August 1970) generally affirming but making some minor changes, 25 FCC 2d 318.

4/ This principle was extended in a few cases in 1973 to permit carriage of the ABC Reasoner Report program at 7 p.m. E.T. without counting toward the permissible three hours, where it is both preceded and followed by a half-hour local program, one of which is public affairs.

4. While not required by the terms of the rule, two other developments have occured. First as far as network origination of programs is concerned, the time cleared of network programs has been the first hour of prime time, or 7-8 p.m. E.T., Monday through Saturday. On Sunday, CBS and NBC have run from 7:30 to 10:30, leaving 7-7:30 and 10:30-11 as cleared time; ABC has alternated between that schedule and 8-11 p.m. Second, while the rule applies only to the top 50 markets, as a matter of business judgment, the networks decided not to present more prime time programming on affiliated stations below the top 50 markets. Therefore, the rule has led to an across-the-board reduction in network schedules, from 3-1/2 hours on weekdays and 4 hours on Sunday before the rule (25 hours total) to 3 hours a night (21 hours total). 5/

5. Because of complaints about the rule's effects and the filing of three petitions seeking its repeal, the Commission instituted the present inquiry and rule-making proceedding, Docket 19622, on October 26, 1972. This was designed to explore the rule's operation and consider changes in, or repeal of, the rule. Comments in response to the Notice of Inquiry and of Proposed Rule Making 6/ were filed early in 1973, and two days of oral argument was held in July 1973 (with additional written submissions). A total of 59 parties filed initial and/or reply comments or participated in oral argument, including independent producers, distributors and their association strongly supporting the rule; major film producers and other independent producers urging repeal; the three networks; labor organizations (opposing the rule); three "public" groups supporting the rule; station licensees on both sides; and various other parties.

6. On January 23, 1974, a Report and Order was issued, making certain changes in the rule to be effective in September 1974. 7/ All restrictions were removed from Sundays and from the first half-hour of prime time (7-7:30 E.T., etc.). One of the remaing six 7:30 - 8 p.m. half-hours could be used for network or off-network material of certain types -- children's specials, public affairs or documentary programming ("documentary" was defined to include programs which are educational and informational and non-fictional, but not where the information is part of a contest among participants). Finally, feature films were barred entirely from access time periods. Following this decision, the networks made plans to use the additional time made available to them.

5/ ABC presented four hours of programming on Sundays in late 1970, but early in 1971 cut its Sunday programming back to three hours.

6/ Notice of Inquiry and Notice of Proposed Rule Making in Docket 19622, FCC 72-957, adopted October 26 and released October 30, 1972, 37 F.R. 23349, 37 FCC 2d 900.

7/ Report and Order in Docket 19622, FCC 74-80, adopted January 23 and released February 6, 1974, 44 FCC 2d 1081.

All three networks planned to present four hours on Sundays; NBC planned one-hour shows on 44 Saturdays mostly of a news-magazine type; CBS planned 44 half-hour programs at 7:30 on Saturdays, generally children's programming; and ABC planned only 6 to 12 one-hour news documentaries or children's programs on Saturdays. Thus, under these plans, all of Sunday prime time would be occupied by network programs, and, on an annual basis, about half of the Saturday hour previously cleared. 8/

7. The National Association of Independent Television Producers and Distributors (NAITPD), one of the most vigorous proponents of the original rule, sought judicial review of this decision, appealing to the U.S. Court of Appeals for the Second Circuit which had affirmed the original rule in May 1971. 9/ In connection with its appeal, NAITPD sought a stay of the changes for a year, or until September 1975, claiming that the period of 7-8 months allowed was too short a time for independent producers to adjust to "PTAR II". This stay request was denied by us and also by the Court, but the Court set an expedited schedule and on June 18, 1974, issued a decision. The decision (NAITPD et al v. FCC) 10/ did not rule on the merits of our January changes or the contentions of the appellants on both sides (NAITPD et al. urging a return to the original rule, some major film producers and independent producers urging repeal). Rather, it held that the Commission had acted too precipitously in making the changes effective this fall, particularly since, when the original rule was adopted in May 1970, the networks were given some 16 months grace before the effective date in the fall of 1971. The Court enjoined us from putting the changes into effect before September 1975, and remanded the matter to us to determine what the effective date should be.

8. While the Court did not rule on the substance of the changes, it did indicate some areas where it believed further Commission inquiry would be appropriate. It is suggested that we get the views of public groups — consumer groups, minority groups, etc. --

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8/ It appears that the expansion of network time by an hour each on Sundays would have resulted in six additional situation comedies (although the new programs would not necessarily have been all on Sundays since there was to be some rearrangement of schedules). As to NBC's planned use of an hour on most Saturdays, strong opposition to this was expressed by NBC affiliates in May, and it was not at all certain as of early June that this planned programming would have been presented had the rule remained in effect, or that affiliates generally would have cleared it if it had been carried on the network.

9/ Mt. Mansfield Television, Inc. v. FCC, 442 F. 2d 470 (C.A. 2, May 1971).

10/ National Association of Independent Television Producers and Distributors et al. v. FCC and U.S. 502 F. 2d 249 (U.S.C.A. 2, decided June 18, 1974).

particularly concerning the effect of the rule on television advertising in prime time, 11/ and the impact of the rule on programming for minorities. It was also suggested that playwrights and actors could offer views as to the effect of the rule on their professions. Aside from this broader input, the Court also expressed the desire for more definite statements concerning three matters: the argument that the rule works to increase, rather than diminish, network dominance; the effect of the rule on competition, as to which we were urged to get the views of the Justice Department; and the question of economic impact on Hollywood, the argument being that the rule, by reducing the amount of prime time available for network programs, has a serious impact on the U.S. program production industry and employment in it.

9. In light of these Court observations, we issued on July 9, 1974, a Further Notice Inviting Comments in this proceeding (FCC 74-756, released July 17, 1974, 39 F.R. 26918). We invited comments from parties on the six points mentioned by the Court, and from consumer groups, minority groups and the public on these points as well as concerning the rule generally. The question of the appropriate effective date was also raised. Shortly after issuance of the Further Notice, the Commission's Office of Network Study directed letters to numerous consumer and minority groups, as well as labor and guild organizations, specifically inviting their comments. Most of these responded, as did numerous other organizations. 12/ Comments and reply comments in response to this Further Notice were due by September 20 and October 10, respectively (though a number of parties, particularly public groups, filed late).

10. Description of comments in response to the Further Notice. A total of 43 formal and informal initial comments were filed in response to the Further Notice. Of these, 17 were from public groups, all but one of them supporting the original rule and opposing the January PTAR II modifications. They also opposed waivers or any other relaxations, and also suggested additional regulatory requirements. The Department of Justice also supported the original rule. The Office of Telecommunications Policy (OTP) urged repeal of the rule entirely. Of 24 comments from private parties, 9 urged return to the original rule -- NAITPD; ABC (although not viewing the PTAR II compromise as unsatisfactory); Westinghouse Broadcasting Company, Inc. (Westinghouse); Station Representatives Association (SRA); program suppliers Sandy Frank, Time-Life Films, Inc. and Viacom International, Inc.; and TV licensees Leake TV, Inc. (Little Rock and Tulsa), and Wometco Enterprises, Inc. (comments relating chiefly to Miami). Ten (10) comments from private parties urged repeal of the rule -- three from six major film companies (Warner Bros. Television-

11/ The Court noted the two sides of this question urged by opponents and proponents of the rule respectively: that the rule has increased the number of commercials in access time, and that this development is offset by increased opportunity for local advertisers.

12/ The groups contacted by letter from whom no response was received (directly or through another affiliated organization) were the Consumers Federation of America, National Association for Better Broadcasting, Asian Americans for Fair Media, and the National Council of Senior Citizens.

United Artists-MGM Television, MCA Inc.-20th Century Fox, and Columbia Pictures Television); CBS; National Committee of Independent Television Producers (NCITP); Screen Actors Guild, Hollywood Film Council and Writers Guild of America (West) in joint comments; Authors League of America, Inc.; and licensees Metromedia, Inc. (chiefly independent stations in New York, Washington, Los Angeles, etc.), KOOL Radio Television (KOOL-TV, Phoenix) and Newhouse Broadcasting Corp. (comments relating chiefly to Syracuse). NBC supported the PTAR II compromise. Four other parties took no position as to the basic rule. The latter were Motion Picture Association of America, Inc. (MPAA, urging repeal of the feature-film ban), Association of Independent Television Stations, Inc. (INTV, specifically taking no position because of a split among its members); the Wolper Organization, Inc. (urging further consideration of its proposal for an exemption for "educational value" programming); and Bill Burrud Productions, Inc. (seeking definition and clarification as to the status of off-foreign network material under the off-network restriction).

11. Fourteen reply comments were filed, including 9 by parties who had filed earlier comments, and five new parties. The new filings included Post-Newsweek Stations, Inc. (Washington, Miami, Hartford and Jacksonville), and four public groups -- the American Civil Liberties Union (which had participated in the proceeding in 1973) and public groups in the St. Louis and San Francisco Bay areas and in Alabama. All of the new parties supported the original rule. The 5 comments from new parties are in large part not proper reply material, being original statements of position rather than an answer to something filed in initial comments. This is not entirely true of the ACLU and Post-Newsweek comments, and the other three are, for the purposes of this decision, cumulative of earlier material filed by public groups. The comments listed are considered herein. 13/ Parties filing comments and reply comments are listed in Appendix B.

13/ We do not consider herein, except to note the general position taken pro or con, material filed later than October 11, the due date for filing comments. This includes comments from the Office of Communication of the United Church of Christ (supporting the rule), some Urban League chapters filing informal comments to the same effect as Youngstown and Grand Rapids filings earlier, and supplemental material filed by Warner Bros. Television and other majors, and Sandy Frank.

12. Changes in position. A few parties participating in the proceeding at this stage have changed position from their earlier views. INTV, the independent station association, and Metromedia, formerly strong supporters of PTAR I, now either take no position or urge repeal. Metromedia claims that the rule works to the detriment of independent stations because of more sophisticated techniques used by affiliated stations in selling access-period advertising. Leake TV's position supporting the rule (because of successful hour-long news operations on weekdays) is a reversal of its earlier stand. Post-Newsweek's support for the rule is to some extent a departure from its oral argument position supporting the basic network restriction, but urging repeal of the off-network limitation. NBC's position favoring PTAR II, and (in reply comments) vigorously opposing the majors' argument for repeal, is roughly the same as its oral argument position expressing support for the rule in the interest of certainty and an end to controversy. This position, however, is completely at odds with its original position, as one of the 1972 petitioners strongly urging repeal. 14/ Otherwise, the parties have much the same positions as they had earlier. A detailed analysis of the comments mentioned appears in Appendix C.

14/ As to the other networks, ABC at all stages of this proceeding has been a strong supporter of the rule, although it states that it did not find the PTAR II compromise unacceptable to it. CBS urges ultimate repeal, as it has before, although it urges a delay before full repeal just as it did in oral argument (its position is now that PTAR II should be in effect for 1975-76, with full repeal effective in September 1976).

II Discussion and Conclusions

13. As stated at the outset, the Commission has decided to return to PTAR I, the original rule adopted in 1970, except for the codification of certain waiver practices which have grown up under it (sports runovers, network news following an hour of local news, time-zone differences, etc.), and except for network or off-network programming which is designed for children, public affairs or documentary programs, and different provisions as to feature films. Most paragraph references below are to Appendix C (C-3 etc.)

A. Arguments of Opponents of the Rule

14. In evaluating the arguments of the majors and other opponents of the rule, it is important to bear in mind the rule's primary objectives: to lessen network dominance and free a portion of valuable prime time in which licensees of individual stations present programs in light of their own judgments as to what would be most responsive to the needs, interests and tastes of their communities. At the same time, the rule seeks to encourage alternative sources of programs not passing through the three-network funnel so that licensees would have more than a nominal choice of material. These are still valid objectives. It was also noted that this increased supply would be a concomitant benefit to independent stations; and "it may also be hoped that diversity of program ideas may be encouraged by removing the network funnel for this half-hour ...". Thus, diversity of programming was a hope, rather than one of the primary objectives. It was emphasized that the Commission's intention is not to smooth the path for existing syndicators or encourage the production of any particular type of program; the "types and cost levels of programs which will develop must be the result of competition which will develop." 15 /

15. As to the matter of network dominance, it is readily apparent that, as far as network control over station time is concerned, it is reduced by the requirement of cleared or access time, and that certain public advantages have resulted. These include, the local programming activities which have been stimulated, including those mentioned by the various minority and other citizens' groups filing herein (pars. C-3 - C-5), and others such as those mentioned by Leake TV, Wometco in Miami, and Post-Newsweek stations (par. C-50), and others in Boston, Washington and other places. It may be that these programs in some cases would have been presented anyhow, and possibly at a reasonably desirable hour in prime or fringe time; but their presentation in high-audience hours is certainly facilitated by the rule, as Wometco, Urban League and the others point out. These showings afford tangible evidence

15/ See the May 1970 Report and Order in Docket 12782, pars. 23, 25-26, 23 FCC 2d 382, 395-397. The matter of local programming was also mentioned in a footnote as being in the public interest (23 FCC 2d 395, footnote 37).

of the benefits flowing from the rule. 16/ The same applies to the presentation of syndicated programs which, in the licensees' judgment, have particular appeal to their stations' audiences, such as Lawrence Welk and Hee Haw after their cancellation on the networks. In sum, the rule in this respect has provided a significant public benefit, in freeing licensees to exercise their own programming judgments. Also of significance in this connection is the fact that affiliated stations are able to retain all of the revenues from access program time (less the amount they spend for programming, typically no more than 33% according to earlier material herein) 17/, compared to about 30% which they typically get from the networks for network time. Thus they have more money from which to support local programming efforts. We find it an important and valid consideration.

16. Also of considerable importance is the encouragement of a body of new syndicated programming, which independent stations may use as well as affiliated stations, by making prime time available for its presentation. Such a body of programming has developed (see pars. C-29, C-49, C-55 and Appendix D). While the majors et al. urge that this is not of significance (being game shows, foreign imports or other network "retreads"), it is premature to make any final judgment at this time as to the character of this programming (assuming that such a judgment is ever appropriate). There has, of course, been a reduction in network programs, and thus no doubt in programs which could become off-network material; however, the latter is rather speculative as to quantity, in view of the rather large number of current and recent network prime-time programs not lasting long enough to make a syndication package, and increased network use of movies, sports, etc.

16/ In the reply comments of Warner et al., it is claimed that the impetus to local programming cannot be used to justify the rule, since it was not essentially one of the reasons for its adoption. Three cases are cited in this connection: SEC v. Chenery Corp.,332 U.S. 194 (1947); Burlington Truck Lines v. U.S., 371 U.S. 156 (1962); and Columbia Broadcasting System,Inc. v. FCC,454 F 2d 1018 (C.A.D.C 1971). These cases do not support the concept claimed, since they deal with the extent to which a reviewing Court may consider matters not mentioned in the agency's decision but otherwise asserted, for example in its appellate brief or oral argument. In fact, the Chenery case cited (the second of these well-known decisions) basically stands for just the reverse. There, the Supreme Court affirmed an SEC decision which reached the same result as an earlier decision in the matter which the Court had reversed because it found it to be based on an invalid rationale. The Court approved the SEC's reaching the same result on further consideration for a different reason. It is clearly erroneous to claim that we cannot consider an obvious public-interest benefit from the rule even though it was not one of the main reasons for its adoption.

17/ See Report and Order in Docket 19622,January 1974,44 FCC 2d 1081,1111.

In any event, we conclude that it is definitely in the public interest to encourage the development of a body of new (not repeat) programs outside of the network process, and thus provide opportunity for the development of new program approaches and ideas.18/

17. On balance, we conclude that the rule also has other benefits. These include the increased opportunity for non-national advertisers as well as an optional outlet for national advertisers who may choose to use spot rather than network messages.19/ There is increased programming of a public service character presented by ABC as a result of its greater profitability under the rule (see par. C-50). Finally, there is the emergence of successful distributors who are able to finance their own and others' production of network and non-network programs, e.g., Worldvision and Viacom (see pars. C-28 and C-49(a)). As a result there is now an increased number of producers active in prime time. In light of the different views as to the present effect on independent stations, we do not attach significance at this time to the benefit to independent stations formerly claimed and still asserted by some parties.

18/ At the 1973 oral argument some NCITP members claimed that the networks exercise no creative control but are simply a conduit. Whether or not this is true with respect to the conception and actual production of a program, the networks obviously exercise a high degree of control in the real sense that they select the programs for network exhibition, according to their views of their needs at a particular time, and also control the continuation or cancellation of the program.

19/ We believe that this is not outweighed by programming (pars. C-11-12 and C-45-4). We note in this regard that most of the public groups did not express great concern about the commercial level of prime time access programming.

18. Diversity and other programming considerations. We do not regard the various points urged by Warner et al., and other opponents as warranting repeal of the rule, or modification beyond that adopted herein. Of the 9 points mentioned by Warner (other than first Amendment arguments discussed below), the most significant are those relating to the character of access-period programming, since we must always keep foremost in mind the interest of the viewing public rather than the interests of private parties. We reject the argument concerning lack of diversity and quality, as a basis for action at this time beyond that taken herein, for a combination of reasons. First, we are persuaded that the rule has not yet been fully tested. An evaluation of its long-term potential cannot be made at this point, with respect to the kind of programming which is likely to develop with time and a more favorable climate. The uncertainties mentioned in par. C-49(b), have undoubtedly had a discouraging effect on investment in the development of programs other than those most easily produced and readily saleable. We note the failures mentioned by Warner, et al. (par. C-61); but it is arguable that a number of these resulted from various uncertainties, including the uncertainty as to the judicial affirmance of the rule until May 1971. 20/ Also, we cannot agree with Warner, et al. that the first year afforded a test simply because, although the "off-network" and feature film restrictions were not in effect, only 23% of access time was occupied by such material. This, over 450 half-hours, when taken together with the amount of time then and now devoted to news and other long-established usages, could well have been a formidable obstacle, along with the other uncertainties just mentioned. Finally, we believe that the case for economic factors being an iron-clad, immutable obstacle to more elaborate programming efforts has not been made. See par. C-62, particularly NAITPD's filing, and the January 1974 decision herein, pars. 89-91,44 FCC 2d 1081, 1137-38. In sum, we do not think it is established that "nothing different is to be expected", given reasonable certainty as to the rule.

19. It is also to be noted that there is by no means a total lack of diversity, even though the emphasis is on game shows. There are a number of programs of other types, including animal shows and musical variety shows. Thus, the picture is not as monotonous as Warner's description might indicate, even looking at syndicated programming alone. See pars. C-51-52 and C-55, and Appendix D.

20/ See Report and Order in Docket 19622, 44 FCC 2d 1081, 1165, concerning Metromedia's Primus program.

20. Perhaps more fundamental is the question of to what extent repeal or really substantial abridgement of the rule would be justified on the basis of a Commission evaluation of such matters. Action on a basis like this has the danger of reflecting the Commission's personal predilections and prejudices. A related question is, assuming such an inquiry is appropriate, what standards should be used, and whether they should be applied, in a sense, retroactively and without any public input into their formulation. For example, assuming that 65.6% of access entertainment time devoted to game shows is undesirable, what about 41.2% of network prime time devoted to crime-drama shows of various types? If we look at the concentration of game shows in certain markets such as Cincinnati or Albany, must we not look also at three network crime-drama shows opposite each other on Wednesdays at 10 p.m.?

21. We do regard it as important to provide greater opportunity for the presentation in access time of certain kinds of material which are to some extent inhibited by the rule. One of our objectives in so doing is to promote an increase in the range of fare available to the public at these times. Should the time come to review the rule again, it may well be that a continuing lack of diversity will be grounds for change; but we do not find it so now except as provided herein.

22. Warner et al. urge two other points concerning programming: the undesirability of use of foreign product, and under-representation in access programming of minority groups and women. As to the first, Warner claims that the rule discriminates against American producers and favors foreign producers, which is also urged by another producer, Bill Burrud. Our conclusions are basically the same as they were earlier; see January 1974 decision, pars. 98-99, 44 FCC 2d 1141. In light of the reduced role which foreign product plays in access programming this year as compared to earlier years under the rule, action to repeal or substantially abridge the rule on this basis is not warranted.21/ While it is regrettable that American producers face off-foreign-network competition, which comes in with a cost advantage, this is a situation which obtains elsewhere in our economy. As to the other point -- alleged irrelevance of access-period programs from the standpoint of minority groups and women, and American social problems generally -- this is much too speculative a matter to afford basis for action at this time, particularly in view of the impetus to local programming. See also pars. C-8 and C-42.

21/ According to the majors' joint appendix, off-foreign network programming (the only foreign-produced material which probably should be considered in this connection) occupied 7.2% of access entertainment time in 1974-75, compared to 14.3% last year and 17.6% in 1972-73.

23. Other arguments - With respect to the argument concerning increased network dominance in the broad sense, the case for that proposition is not established in this proceeding. Network dominance is obviously reduced by the reduction in network prime time programming; and this reduction is only slightly lessened by the somewhat greater carriage of network programs during network prime time through decline in station preemptions and non-clearances. As indicated in par. C-22, station preemptions have generally been small in the past (nothing in the order of the amount of time involved in the rule), and they continue despite the clearance of time resulting from the rule; for ABC, the only data given, the decrease has been from 7.1 to 3.7% of U.S. TV homes for the average program. With respect to the role of network-owned stations in access program success (pars. C-23 - C-26), while this is often quite important and sometimes vital, it is certainly not necessary for all programs. Some, including some of the most successful, have no owned-station exposure at all, and in other cases the sale to an O&O is on an individual basis, not representing any group purchase. The networks have a greater veto power
over programs offered for network exhibition. As to the economic respects in which network control probably is increased, the relationships with national advertiser customers, and producer suppliers, the material set forth (pars. C-18,C-20-21) indicates that this increase in dominance is still an unresolved issue. As to relations with producers, the situation may well be an undesirable one, as indicated by the article noted in Appendix C; but it is not at all clear how much this results from the prime time access rule, or would be changed by repealing it. 22/ If the number of unsold pilots is as great as Warner et al. claim, nearly 300, it does not appear that the expansion of network prime time by four hours a week per network would necessarily alter substantially the "leverage" situation. In any event, this particular situation is one which could be approached in other ways, such as the current Justice Department antitrust action (refiled December 10, 1974) or consideration of some restriction on network control and rental of production facilities. Moreover, as the proponents of the rule point out, both advertisers and producers have an alternative under the rule -- access period programming -- which they are free to use. For purposes of the prime time access rule, we conclude that network dominance is decreased, and that there is no warrant here for modifying it.

22/ According to Daily Variety, December 3, 1974, conversations between CBS, NBC and their program suppliers are in progress on this subject. It would be improper to act to modify the rule on the basis of this situation when it is subject to change.

24. With respect to the impact on employment in the program production industry, on the basis of the facts presented herein (pars. C-33 and C-39-40 and related footnotes), we find nothing presented to us which could be considered relevant to our decision. What is claimed to be involved are some 3,570 fulltime jobs, with at least some of this loss attributed to the rule made up by increased station employment (up more than 1,000 at top-50-market affiliated stations from 1971 to 1973 according to ABC, and some of this is attributable to the rule). Additionally, there are gains in production of non-network programs as well as sales and similar activity. Bearing in mind also the uncertainties involved (such as the lack of comment from AFTRA, which represents many actors in taped shows), we conclude that it is not a relevant factor on the basis of what is before us.

25. As to the more general subject of the well-being of Hollywood entities such as the major film companies and film producers (pars. C-38 and C-39), we do not find in these arguments reason to repeal or substantially abridge the rule. As has been pointed out many times, the problems of Hollywood are of long standing, having many causes, and it is unclear as to the extent the problems are attributable to the rule, or how much help repeal of the rule would afford. We agree with the proponents of the rule that it is not the responsibility of the Commission to return Hollywood companies to their buoyant health of pre-1948 days; and, as ABC points out, most of the majors are doing rather well and they always have the choice of producing for access time. It may be that the majors would benefit from repeal of the off-network restriction; but in our judgment that would clearly be inconsistent with the public interest in stimulating the development of new material, as well as having a tendency to reduce employment in program production even more. In sum, we do not find in these considerations anything of decisional significance in this proceeding.

26. The last argument in this area is the effect on creative persons -- actors and playwrights referred to by the Court, and others such as producers, musicians, etc. (pars.C-36-37 and C-41). In this connection, there is an impact on the creative opportunities for some persons as the rule has operated so far, since there is less network programming of a dramatic or comedy nature which uses them, and very little from U.S. sources of the same type for access-period use. But in this respect, it is simply too early to evaluate the rule's long-term effect. Other categories of persons, such as musicians, may well have gained by virtue of the musical variety shows which occupy a certain amount of access time but which are almost totally absent from current network prime time. Playwrights appear not to be significantly affected by the rule one way or the other, since original drama has greatly diminished on network television over the years, and, as the Authors League points out, the rule has not resulted in any such material on stations. We do not find reason here to repeal the rule.

27. With respect to the last of the majors' points -- the greater level of commercial activity in access-period programming -- our views have been set forth in par. 17 and footnote 19 above.

B. The Exemption for Children's, Public Affairs and Documentary Programs; Arguments of Rule Proponents

28. As mentioned above, we have decided to permit an exemption for "programs designed for children" and "public affairs programs or documentaries." The definition of children's programming is "programs primarily designed for children aged 2 through 12". The term documentary program is defined as "programs which are non-fictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself". It should be noted that the exemption is different from that in PTAR II in two respects: (1) it refers to "children's programming" without limiting it to children's "specials"; and (2) the definition of documentaries is designed to exclude (in addition to game shows) documentaries about the entertainment world more than half of which are devoted to showing entertainment material.23/

29. We find that the prime time access rule has had the effect of inhibiting certain kinds of programming which we believe are entitled to special treatment so as to encourage their timely presentation in prime time. We believe that the importance of these kinds of programming outweighs any concern as to its source, whether locally produced, first-run syndicated, network or off-network, and that the public interest is better served by allowing children's programming, public affairs programs or documentaries to appear to some extent in cleared time regardless of their source, and that stations should not be prohibited from also presenting three hours of other network or off-network prime time programming, The viewing public has a right to these types of programming, and the prime time access rule, by its operation, has had the effect of limiting this right.

23/ This limitation on the exemption is designed to deal with a possible loophole -- the presentation of substantial amounts of what is really regular entertainment programming in the form of a documentary concerning the entertainment industries. If a program of this sort is to be presented under the exemption, it must be at least 50% devoted to material other than the entertainment material itself.

30. With respect to children's programs, it appears that a very small amount of such material is locally produced and carried in access time (programs in Boston and San Francisco were mentioned in the comments). A small number of syndicated programs (current or in earlier years under the rule) might also fall into this category, although we would not necessarily regard all programs so considered by some as falling within the scope of this exemption. 24/ We have also recently granted waiver for a total of six off-network specials of this type. However, our concern here is with the numerous children's special programs presented by the networks, generally starting at 8 p.m. E.T. or later under the network schedules which have resulted from the rule, as well as with the potential for regular programming significant in this area. As noted in our January 1974 decision herein (44 FCC 2d 1081, 1134) and in par. C-16, the Commission has received numerous complaints from parents, educators and others interested in children's matters, and sometimes from the children themselves, to the effect that this starting time is simply too late in relation to children's bedtime (except, perhaps, on Saturday). As emphasized in the recent policy statement concerning children's television (Docket 19142, FCC 74-1174, released November 6, 1974, pars. 26-27), the Commission wishes to encourage licensees to meet the needs of children with a variety of programming, especially at a time other than Saturday or Sunday morning. In order to foster such material, and avoid the problem mentioned with network broadcasts, we conclude that an exemption to permit access-period presentation of such material (in addition to the usual three hours of network material) should be granted, with respect to both network and off-network programs. As mentioned, we are extending this to regular as well as special programs, since they may be equally beneficial to the public. For example, we note the waiver request filed by Children's Television Workshop late in 1972, seeking permission for a CTW-produced regular network series at 7:30. Action on this was held in abeyance pending overall consideration of the rule in this proceeding, and it was not renewed (apparently because no agreement was reached with ABC, the network involved). See Children's Television Workshop, 40 FCC 2d 76 (March 1973).

24/ NAITPD in its January 1973 comments listed six syndicated programs as falling in the "children's"category -- Black Beauty, Circus, Family Classics, Lassie, Mouse Factory and Story Theatre -- with Wait Till Your Father Gets Home listed as Children's Variety. A number of these shows are no longer in production; the data in Appendix D shows only Family Classics and Mouse Factory carried in one market each, and Wait Till Your Father in three. The newer Salty program, listed by some parties as a children's program, is carried in three markets, and Rainbow Sundae, a program produced by ABC-owned stations and described by ABC as a children's program, is carried in four markets.

31. It is our expectation that networks and licensees will not abuse this exception to the rule, particularly in access-period use of network or off-network programs which, while having some appeal to children, were or are not primarily designed for them but for viewing by adults, or adults and children, and for presentation of normal commercial advertising addressed to adults. The programming permitted by the exemption is intended to be only that primarily designed for pre-school and elementary school children, ages 2 to 12, taking into account their immaturity and special needs. 25/ Also, while the exemption is not limited to educational or informational material, an important purpose of it is to promote the presentation of such material, whose importance we have recently emphasized in our Children's Television Report and Policy Statement (Docket 19142, FCC 74-1174, released October 31, 1974 39 F.R. 39396, pars. 16, 17, 18 and 22).

32. With respect to public affairs programming, this is not available in significant amount in new syndicated material, although of course there is a substantial amount of such programming produced locally and presented in access time, one of the important benefits of the rule as already mentioned (see par. 15, above and pars. C-5 and C-50). As to the networks, there is a substantial amount of public affairs programming (and similar news documentary material) in prime time on all three networks, but no regularly scheduled material, 26/ whereas before the rule both CBS and NBC had regular prime-time programs of this nature, and it is also noted that some such network programming occurs outside of prime time. We conclude, therefore, that the rule constitutes an inhibition on the networks' exercise of this highly important part of their activities, fulfillment of part of their journalistic function to advise and inform the public concerning matters of public importance, and that this added benefit outweighs the impingement on access time. This exemption is a codification and extension of the existing waiver for one-time network news and public affairs programs which has been in effect throughout the rule's history. That exemption has not been used to an inordinate extent by the networks, and, as discussed below, we assume that this exemption also will not be utilized to effectively undercut the basic rule.27/

25/ In the networks' regular prime time schedules starting in January 1975, it appears that only NBC's Disney program would come within this exemption.

26/ In January 1974 Report and Order herein (par. 83, 44 FCC 2d 1134) it was stated that one criticism of the rule is that it has resulted in the total or partial disappearance of public affairs and related documentary material from prime time. The reference was intended to be to regular programming of this sort, as made clear later in the document, par. 101 (44 FCC 2d 1141).

While there are some regular public affairs programs in the early evening, such as ABC's Reasoner Report on Saturday and CBS programs on Sunday, we believe the rule has hadtthe effect of limiting prime time presentations of this type of programming.

27/ See Waivers of the Prime Time Access Rule for 1974-75 Broadcast Year, FCC 74-974 (September 1974, pars. 15-16, 31 R.R. 2d 409, 417).

33. Documentaries as defined herein also, of course, includes other programs, such as National Geographic and Jacques Cousteau specials and the America series, both network and off-network programs. In our January 1974 decision we noted the value of these programs (usually produced independent of network control) to the public, as well as the difficulties involved in getting network prime time for programs such as National Geographic under the rule, or of producing them for distribution in syndication. See Report and Order, pars. 66-67, 84: 44 FCC 2d 1127-1128, 1134-1135. We are still of the same view. 28/ It is also recognized that, particularly as to use of off-network material, the exemption includes half-hour animal series, such as Wild Kingdom and Animal World, as well as a series of one-hour off-network outdoor specials for which a waiver request is pending (from the producer of the World of Survival series). We conclude that the exemption should be broad enough to include such material. When it comes to the off-network restriction, this is not related to network dominance directly, but is simply a restraint on licensee freedom of choice, designed to preserve the potential of cleared time availability for new non-network material. We conclude that preservation of this restraint is not warranted, when it comes to barring a station from using programs such as Wild Kingdom or Animal World (which were independently produced) in cleared time, instead of another program of the same or different type. In sum, in view of the obvious informational value of documentary programs, the benefit to the public from facilitating the presentation thereof outweighs in importance what might be termed an increase in network dominance (to the extent these are network programs) and an incursion into the full availability of 3 hours a night of cleared time for other new material. Here, as with public affairs and programs designed for children, the public interest is on the side of the programs, and not their place of origin. If licensees are better able to serve the needs and interests of their viewing public by presenting network or off-network public affairs and documentary programs, or are better able to serve the needs and interests of children, then we should remove the obstacles to this service which exist under the prime time access rule, Permitting this additional material into the access period will also serve to increase the diversity of fare available.

28/ We note in this connection that while the Cousteau series is on ABC in prime time this year, there will be no National Geographic specials. Their absence (which has been the subject of numerous letters of complaint from the public) is probably not directly attributable to the rule itself (since such programs have been shown on networks during the previous three years) but relates rather to the timing of the Court's decision in relation to the 1974-75 season. However, this does illustrate the problems involved in contraction of network prime time.

34. We expect the networks, and licensees in their acceptance of network programs and use of off-network material, to keep such programming to the minimum consistent with their programming judgments as to what will best serve the interests of the public generally.29/ We continue to attach high importance to the rule as a limit on network dominance over station time, and as a means of opening up substantial amounts of prime time to sources of new non-network programming, be they producers and distributors for syndication, or local sources. We attach particular importance to the programming opportunities available on Saturday in the access time period. We do so because of the significance of existing local programming efforts in this time period, and the fact that this time offers the most significant opportunity for hour-long access programs. We caution networks to avoid any incursion into this period unless there are compelling public interest reasons for so doing. If there are extensive deviations from these precepts, the exemption may have to be re-visited.

35. In acting herein to permit an increase of network programming of certain types, we are only opening up an option for licensees to use such additional network material if, in light of their programming judgments as licensee-trustees meeting the needs, tastes, interests and problems of their coverage areas, they deem it appropriate to do so. Our purpose is to make available to licensees programming which, to some extent, was removed from prime time or caused to be run at a much later hour. There is intended no requirement, or even a suggestion, that such additional network programming should be carried in order for a licensee to carry out properly his programming obligations.30/

29/ Thus, the stripping of off-network material on the theory that it is a program designed for children or a documentary program, would not be regarded as consistent with the spirit or objectives of the rule.

30/ According to a May 29, 1974 Variety article concerning the intensive discussion at the NBC affiliates' meeting about affiliate carriage of the Saturday news documentary hour contemplated under PTAR II, an NBC official stated: "This gives you a chance to do what the commission (FCC) has asked you to do. If any station wishes to separate from the network, that's your decision. It is not a decision I would make." All that is involved in our decision here is giving licensees a "chance" to use this material, if their judgment as licensee-trustees so indicates.

NAITPD argues that "any regulation which permits the use of prime time for network or off-network material in fact ensures the use of prime time for such material ...". This proposition is obviously not literally true. There has always been, and still is, pre-emption of network prime time material; and during the first year of the rule, when off-network material was permitted in access time, only 23% of such time was devoted to it.

36. Arguments of proponents of the rule. In light of the foregoing, we turn to the arguments advanced by the proponents of PTAR I, including the numerous citizens groups (pars. C-4 - C-14) and NAITPD, Frank, Westinghouse, AEC and other private parties (pars. C-49 and C-54 -C-59 and NAITPD's Court brief). These arguments are addressed largely either to repeal of the rule or the more substantial modifications made in the PTAR II decision; but they apply pro tanto to the exemption discussed above. Some arguments, concerning the impropriety or illegality of preferred classes of programs, relate entirely to this exemption; these are discussed below as part of the First Amendment discussion. Others include: the importance of local programming efforts and the impact of any diminished access time on them; the objectives of the rule; the contentions that any additional network time works to increase network dominance and diminishes opportunities for alternative program sources and a healthy syndication industry; the success of the rule and advantages flowing from it (par. C-49); the potential harm done by the modifications in PTAR II, for example local programming and the chilling effect on the production of programs having to compete with the additional network or off-network material; the rule's shortcomings in practice are not chargeable to it but to stations or networks,and these shortcomings should be attacked by other ways consistent with the rule such as requiring the networks to advance their children's programming by giving up 10:30-11 instead of 7:30-8, making them carry adequate amounts of public affairs programming in their own time, questioning stations as to over-use of game shows or stripped programming, etc.; that weakening the rule affects the entire package adopted in 1970; and NAITPD's contention that under the Commission's approach and its waiver decisions, almost everything seems to be more important than preserving the rule.

37. The short answer to many of these objections is that it is not to be anticipated that these changes will have the untoward results claimed, so as to lessen significantly the advantages flowing from the rule. We do not expect that syndicated programming opportunities, for example the development of material such as dramatic or comedy programs, will be seriously affected by the minimal reduction in time. Similarly with local programming activities, there appears little reason to believe that they will be seriously affected, particularly taking into account the licensee's established obligation to present material of particular significance to his community. We find much too speculative NAITPD's argument that increased competitive pressure will force diminution of this kind of programming activity. It is apparent, in our judgment, that sufficient cleared time is left for local stations to garner the economic support necessary to present such local efforts. We appreciate the participation of the numerous public groups in this proceeding, and we respect their views; but we cannot accept the proposition (which is more or less explicit in the comments of some groups such as the Urban League, and implicit in others) that network programming has little to offer, so that we would not be justified in permitting its expansion if there is the slightest chance that the cause of localism in prime time television would be impeded. We have noted on many occasions over the years the value of national network programming, and the contribution it makes to American television.

38. Aside from the impact in terms of time, there is also the impact in terms of program type, of which NAITPD and others complain. The argument is based on the assumption that nothing can possible compete with network or off-network programs of the same type, so that no one will attempt to produce new material of this nature. In this kind of situation, we have to consider what is really precluded. As far as we know, there has been very little syndicated public affairs programming, or documentaries like America or National Geographic, except for material from foreign sources. There are other half-hour animal shows. But in view of the extent to which these are also of foreign origin (e.g., Wild, Wild World of Animals) or are easily made largely from stock footage, it does not appear that there is a substantial impact in this respect.31/ As to children's programming, we conclude that the public interest in promoting this from whatever source, for reasons stated in our recent children's television decision outweighs any minimum incursion into the access period. In connection with public affairs and similar programs, we recognize the importance of encouraging a multiplicity of voices. But as mentioned, very few such voices have come forward other than at the local level, which we do not believe will be substantially affected. Bearing in mind the tremendous resources which the networks have for such programming, we conclude that the facilitation of such material from network sources outwieghs the claimed disadvantage.

39. We have kept the exemptions narrow so as to avoid any undue incursion into the access period. There will continue to be excluded from access time those programs which make up the bulk of present and former network programming -- entertainment programs such as drama, comedy and variety -- thus leaving the field for the development of such material to eligible access-period sources.

31/ See Newsweek, December 9, 1974, pp. 119 and 121, concerning the making of animal programs.

40. We have considered the argument that we should take other approaches to meet what we consider the shortcomings of broadcasting under the rule -- require the networks to run children's programs earlier (giving up the 10:30 time slot instead of 7:30), requiring them to run a certain amount of public affairs in their own time, questioning stations about over-use of game shows or stripping, etc., rather than by relaxing the rule and nullifying its benefits. The same kind of argument applied to off-network material -- licensees should be required to run it at other times or, if early evening access time is so important, to run it then and preempt network programs later. We do not agree. We believe that these alternatives would involve the Commission too deeply in day-to-day programming and scheduling decisions. 32/

41. We do not find persuasive the argument that modification of the rule increases network dominance and returns time to the monopoly whose excesses led to the rule. As to the necessity of a full hour of cleared time for the adequate development and health of the industry, this was the conclusion of the 1970 Report and Order in Docket 12782, but the decision contains no particular discussion of the exact amount of cleared time, and there had been no study of the syndication market. We are still committed to the concept of a substantial access period. The limited modifications adopted at this time simply reflect a desire to mitigate certain undesirable effects which came about as a result of PTAR I. We call attention to the statement in the 1970 Report and Order that it was not our objective to smooth the path for existing syndicators, or to create for them a competition-free enclave (23 FCC 2d 397). Our action here is in line with those concepts. We conclude that the time reduction involved here is not sufficient to impair the opportunity for the growth of a reasonably healthy syndication industry, and that, even if it does represent some small impairment, this is outweighed by the benefit to the public of the resulting programming. As to the argument concerning the impact on the package of rules adopted in 1970 (prime time access, financial interests and syndication) there is nothing in our action here which affects the financial interest and syndication rules.

32/ We are also not adopting rules, suggested by some parties in this connection and others, which would provide for some of cleared time to be later in the evenings. We have decided to abandon the tie of cleared time to specific periods adopted in PTAR II, to return to the basic three-hour limitation, in the belief that any tighter limitation unduly reduces licensee freedom and flexibility, and gets the Commission too deeply into the details of station operation. As to the networks being required to give up the 10:30 time slot in order to run children's specials at 7:30, it is far from clear that an irregular schedule of this sort would serve the interest of access-period program producers, stations or the public. The Commission is concerned that such a trade off might have the effect of discouraging the early scheduling of children's programming.

42. Warner Brothers and other opponents of the rule renew herein their arguments that the rule violates the First Amendment in a number of respects; see par. C-64. Some of these were considered and rejected by the U.S. Court of Appeals in its 1971 affirmance of the rule (Mount Mansfield Television, Inc. v. FCC, 442 F. 2d 470, C.A. 2,1971) and need not be discussed here. There remain for consideration the contentions that experience shows the rule to be invalid because of the infringement on the public's right to diversity, and that the rule cannot be justified on the basis of its impetus to minority-group and other local programming activities because it is an over-broad restraint on the right to diversity. Finally, the contention is raised that it is illegal because the Commission is getting into the business of determining programming by setting up categories of preferred programs, as well as by earlier waiver policy. The latter contention is the same as that of proponents NAITPD et al., and is discussed below.

43. As to the first of these, our conclusion is the same as that already given with respect to the majors' arguments as a matter of policy, that the rule has not had a full test so that it can be determined what will ultimately result, and the other considerations mentioned in pars. 18-20, above. The same thing applies with respect to the lack of diversity, and we call attention to our observations in par. 15, above.

44. The proponents' arguments are mostly those contained in NAITPD's Court brief included in its comments herein. The elaborate argument in substance runs along the following lines: (1) the rule was adopted to further the public's First Amendment right to as much diverse programming as possible from the maximum number of diverse sources -- "the widest possible dissemination of information from diverse and antagonistic sources" (Associated Press v. U.S., 326 U.S. 1, 20 (1945)); (2) the PTAR II amendments (including those involved here) violate that concept by returning time to the networks (either directly or through use of former network material), when these were the very monopolies whose excessive dominance led to the impairment of the public's right which the rule was designed to remedy, thus infringing the right; and (3) the returning of time, to the extent it involves preferred program categories, gets the Commission into the business of judgments as to what kinds of programs the public should see, a role completely contrary both to the Constitution and to the §326 and other provisions of the regulatory framework set up in the Communications Act.

45. We point out that the Commission does not violate the First Amendment in interesting itself in the general program formats and the kinds of programs broadcast by licensees (Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)). It is also well recognized, of course, that the inherent limitations in broadcast spectrum space make necessary restraints -- restricting the speech of some so that others may speak -- not elsewhere appropriate (Mt. Mansfield, supra).

46. As we see it, our adoption of the prime time access rule, and its modification herein, may be roughly described from a First Amendment standpoint as follows: the rule was designed to lessen the tendency of licensees which led them to carry network or off-network programming, in order that the voices of other persons might be heard. The rule was a restraint on licensees designed to reduce the impact of another restraint, that of the networks, by preventing licensees from choosing present or former network programs so that new program sources might arise and be heard by the public. Such new persons or sources have come forward, but by and large, as far as syndicated programming is concerned, they present mostly game shows. At the same time, other sorts of programming important to the public -- those included in the exemptions herein -- have been somewhat reduced in amount, or, in the case of children's programming, have not been available at the most appropriate time. Therefore, since it was the Commission's rule which has had this effect, we have an affirmative duty to relax or restructure to permit such programming to be made more readily available. We point out that the kinds of programs involved here are to a large extent those whose importance has been recognized in the Communications Act (§315) or by us recently in the children's programming proceeding.

47. We also regard as without merit NAITPD's attack on the legality of the exemptions. The exemptions have been drawn as narrowly as possible consistent with the interest of the public discussed above, to avoid any unwarranted incursion into cleared time. Thus, we have drawn the exemption so as to exclude the possibility of its being used for network game shows (since game shows are plentiful in access time), and to exclude the whole range of entertainment such as drama, comedy and variety, where there appears a potential for impact on the development and success of material which might otherwise develop for access use.

48. We do not believe that permitting the carriage of programs in the categories exempted raises any questions of a Constitutional nature. We state again that the purpose of these exemptions is to facilitate the carriage of programs which the rule has had the effect of limiting. If we did not believe that we had the authority to make these modifications, we would then give further consideration to the advisability of continuing the rule.

D. Off-network and Feature Film Restrictions

49. As noted in pars. C-67 - 68, some of the opponents of the rule urge that we should repeal the off-network and feature film restrictions of PTAR I, even if we leave the rule in effect otherwise. As to the off-network restriction, we find that repeal or relaxation is not warranted, except to the limited extent adopted herein and discussed above. It is readily apparent that elimination of this restriction would lead to a large-scale incursion into cleared time by use of off-network material, sharply reducing the availability of time to sources of new non-network material. While the off-network aspects of the rule do constitute a restraint which is not directly related to present network dominance, the drastic impact on our objective of encouraging the development of new material would obviously be completely disserved. While there are some results which might be considered anomalous (see par. C-64(b)), this is doubtless true in the short run of any regulation which imposes restrictions looking toward longer-term benefits. We are retaining the restriction except as indicated herein.

50. We have decided to modify prior provisions regarding the use of feature films in access time. Under the changes made here, we eliminate the restriction on movies which have been shown by a station in the same market within a two-year period. At the same time, however, the new rule bars any feature film which has ever appeared on a network from the access period. If a movie has never appeared on a network, it may now be presented during the access hour, regardless of when or whether it has ever appeared on a station in the same market. If it appeared on a network -- whether or not made for television -- it is barred. We believe that this will ease the administration of this portion of the rule for licensees, motion picture distributors, and the Commission. We also believe this to be an appropriate resolution of the two sides of the feature film question raised by the supporters and opponents of our total ban in PTAR II. The supporters of the ban (mainly Sandy Frank) stated that there were sufficient opportunities

for feature films outside of the access period, and that use of theatrical features cuts down television production activity. The opponents argued that the ban was an unconstitutional restraint that would harm independent production of motion pictures. Our approach here will allow certain movies in, thus relieving to some extent this complaint. In addition, this provision is consistent with the goals of limiting network dominance, and encouraging new sources of programming. Feature films are thus treated exactly like any other programming. Upon further consideration, we have concluded that this approach is more in keeping with the basic purpose of the rule.

51. Sports runovers. In subparagraph (4) of new §73.658(k), we are codifying the existing practice under the rule, of waiving sports runover time, where a football game, golf match, or other sports event is scheduled so that it normally would conclude before prime time, but lasts unexpectedly long and the telecast runs until after 7 p.m. E.T. In a much smaller number of cases, the problem is an evening event scheduled to occupy some but not all of the three permissible network hours. While the present situation is by no means entirely satisfactory, and some of the citizens' groups and other proponents of the rule urge us to preserve access time by requiring either a give-back or a roll-back by the networks in these cases, we are not persuaded that this is a serious enough problem to warrant a basically different approach. Certainly, there is not enough incidence of runovers to affect the potential market for syndicated programming. There are other problems, particularly the possible disruption of local programming activities, and NAITPD's claimed problems in connection with "making good" commercial positions in the access program lost because of the runover. We have no specific information as to these sufficient to warrant any basic change.

52. However, as far as professional football is concerned, there appears to have been a high incidence of runovers this fall, with some abuses -- one network when the second game of a doubleheader concluded about 6:45, picking up a third game which lasted until nearly 7:15 -- and some use of time after 7 p.m. for post-game scoreboard or interview shows. We expect that in the future the networks will exercise a greater degree of care in their scheduling of sports events. Such events should be scheduled so that it would be expected that they would conclude prior to the access period in the absence of unusual occurrences such as overtime or delays due to weather.

53. Network news following a full hour of local news. The new rule (§73.658(k)(3)) codifies the existing waiver for a half-hour of regular network news if it is preceded by a full hour of local news or local public affairs programming. This waiver was envisaged in the decision adopting the rule, has been granted since the rule went into effect, and there is no substantial objection to its continuation. The rule does not include the extension of this concept to weekend scheduling arrangements involving APC's Reasoner Report program (which a few licensees wish to delay until 7 p.m., because that is exempt under (1) as a network public affairs program.

54. Time zone differences. The new rule (§73.658(k)(5)) also deals with time zone difference situations, codifying waivers granted in the past for situations such as NBC's Academy Awards and Miss America telecasts, where live simultaneous programming is involved. It provides that a network evening schedule which meets the requirements of the rule in the Eastern and Central time zones will also be held to comply with it in the Mountain and Central time zones. This concept, to deal with the problems presented by such broadcasts in the four time zones of the U.S., has not been the subject of substantial objection.

55. Exemption for special network programming. In new §73.658(k)(6), we are adopting the same kind of exemption as in PTAR II, for what might be called the "Summer Olympic" situation, so called because of the 1972 denial of waiver to ABC to carry material concerning the Olympic games in access time in addition to its own network prime time, an action which aroused considerable protest from the public. This provides that where a network uses all of its prime time on an evening (or all except for brief incidental "fill" material for truly special programming), cleared time may be used for the same material. The exemption reads in terms of an international sports event such as the Olympic games, New Year's Day college football games (NBC's long-standing Rose Bowl-Orange Bowl telecasts), and any other special programming except other sports or movies. In comments early in 1973, NAITPD as well as all other commenting parties who discussed the subject expressed the view that some such accommodation should be made. While a few parties in the present stage of the proceeding oppose this kind of exemption, it appears that relaxation of the rule's provisions is warranted to include such unusual programming.

56. Special network news coverage and similar material. New §73.658(k)(2) retains the exemption for special network news coverage and political broadcasts as adopted in PTAR I, with the slight expansions adopted in PTAR II to include material related to on-the-spot news coverage (e.g., previously filmed material) and political broadcasts on behalf of as well as by qualified candidates. We adhere to the conclusions reached in pars. 103-105 of the January Report and Order (44 FCC 2d 1142) in these connections. NAITPD expresses objection to the expansion to include related material, but in our judgment this is clearly warranted to lessen any impediment to the networks' proper exercise of their journalistic function.

F. Other Matters Concerning the Substance of the Rule

57. Views of the Department of Justice and the Office of Telecommunications Policy (OTP). The views of our two sister government agencies, the Justice Department and OTP, are set forth elsewhere in pars. C1 - 2. It may be that the Department would disagree with our conclusion that PTAR I should be modified to permit additional opportunity for programming of certain types from network and off-network sources; if so, we must respectfully disagree, for reasons stated at length above concerning the importance of increased opportunity for the presentation of such material. As to OTP, we are, of course, reaching a decision largely contrary to its position urging repeal of the rule. As mentioned herein, we believe that it is premature to reach a conclusion at this point as to the programming which may ultimately develop under the rule for cleared time. For reasons discussed above, we must also disagree with OTP's suggestion that it is beyond our proper role to act to increase the opportunity for certain kinds of programs. Our views as to impact on Hollywood employment opportunity, and the welfare of the program production industry, have been set forth in pars. 23-24, above We point out in this connection that OTP's March 1973 study included data only as to the first year of operation under the rule, 1971-72, a period when off-network material in cleared time was still permitted; and therefore it cannot be regarded as of great significance as to longer-term developments, particularly since it focussed almost entirely on production and employment in Hollywood and did not discuss employment gains in other syndicated or local programming efforts, gains in distribution and sales activity, etc.

58. The Rule and Competition. One of the questions raised by the Court in its June 1974 opinion was the rule in relation to the national policy favoring competition in broadcasting, as to which it particularly sought the views of the Department of Justice. We agree with the Department that it is probably too early to give a definitive answer to this question. The rule opens up substantial amounts of cleared time to additional, largely different, producers, and, while much of this time is occupied by the programs of a handful of producers (chiefly game-show entrepreneurs), the situation in this respect is not much different from that of network prime time, where the majors occupy about 55% of it with their material (about the same percentage as the access-period producers mentioned). While some producers who claim that they cannot use the access route may be foreclosed from reaching prime-time television, it is too early to say that this will be a permanent matter. The access period option remains open to them, as well as affording increased opportunity for non-national advertisers as well as an option for national advertisers wishing to use spot rather than network messages. We do not consider the exclusion of off-network material from access time a significant anti-competitive consideration (even though to some extent it may work to the disadvantage of the majors and others), in view of the importance of affording full opportunity for the development of new material.

59. Reasons for not re-adopting PTAR II. We are not adopting four of the five rule changes contemplated by the PTAR II decision last January because we find on further consideration that a general increase in network programming, or opportunity for off-network programming on a general basis, is not warranted in light of the importance of the objectives of the rule. Therefore, we are not adopting the provisions removing restrictions from Sundays and from the first half-hour of prime time on other days. As to the latter, it appeared to us earlier that there is something to be said for increasing diversity by permitting off-network material in addition to the news and game shows which generally fill this period Monday-Friday. As a short-run proposition, this might be true. However, for the longer term, we conclude that this would have too much of an impact on the availability of cleared prime time for the development of new material, and that it might tend to increase the use of stripped game shows in the second half-hour of prime time. With respect to the specification of cleared time as the 7:30 half-hour, on further consideration we conclude that this is an unwarranted restriction on licensee flexibility in scheduling.

G. Other Matters: the Licensee's Duty with respect to Locally Significant Material; the Future of the Rule; Effective Date.

60. As mentioned above, one of the really significant benefits from the rule is its impetus to the development of local programming efforts, and this is one of the principal reasons for retaining it in a form close to PTAR I. We expect that stations subject to the rule will devote an appropriate portion of "cleared time," or at least of total prime time to material particularly directed to the needs or problems of the station's community and area as disclosed in its regular efforts to ascertain community needs, including programming addressed to the special needs of minority groups. Such programming efforts are necessary if the benefit of the rule in stimulating locally meaningful programming is to be significantly achieved, as well as to carry out the licensee's obligation to serve the public interest. We point out, however, that programming of the significant character mentioned need not necessarily be all locally produced. Syndicated or network programming, where it deals with needs or problems common in substantial degree to many communities, may also make an important contribution.

61. The future of the rule. As noted above, the Department of Justice, as well as many of the private proponents of the rule, assert that a period of assured stability for the rule is highly important for realization of its potential for the development of new and varied programming. A five-year guarantee is urged by NAITPD, Frank, Westinghouse, et al.

62. The Commission, however, does not believe it appropriate to give the kind of absolute assurance sought, for a period such as five years, in view of the various uncertainties involved as to what will develop in the fairly near future. While we recognize the need for stability, we do not feel it appropriate for this Commission to bind itself or its successors in this manner.

63. Effective date. The matter of an effective date for the changes adopted herein is important, particularly since the only actual holding of the U.S. Court of Appeals last June was that we had erred in making the changes effective in the fall of 1974. As set forth in pars. C-72 - 73, many proponents of the rule claim that we cannot make any changes, reducing the amount of cleared time, effective for at least 16 months after this decision, the same amount of time given the networks in adopting the original rule in 1970.

64. We respectfully disagree. The changes adopted herein constitute less of an incursion into available access time (particularly in light of our admonition of network and licensee restraint) than would have occurred under PTAR II. We believe that the public interest dictates that the new modifications become effective at an early date because we feel that the rule as amended in this Report and Order will best serve the public interest. Finally, parties to this proceeding have been on notice as to the specific changes adopted in the rule since November 15, 1974, the date of our Public Notice concerning staff instructions in this matter. Therefore, we conclude that these changes can go into effect in September, 1975.

O R D E R

65. In view of the foregoing, IT IS ORDERED, That, effective Monday, September 8, 1975, §73.658(k) of the Commission's Rules, the prime time access rule, IS AMENDED, as set forth in Appendix A hereto.

66. IT IS FURTHER ORDERED, That this proceeding, Docket No. 19622, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION*

Vincent J. Mullins
Secretary

Attachments

NOTE: Rules changes herein will be included in T.S. III(72)-6.

*See attached statements of Commissioners Wiley, Chairman, Lee, and Robinson. Statement of Commissioner Reid to be released at a later date.

APPENDIX A

Effective September 8, 1975, §73.658(k) of the Commission's Rules, the prime time access rule, is amended to read as follows:

§73.658 Affiliation agreements and network program practices.

* * * * *

(k) Effective September 8, 1975, television stations owned by or affiliated with a national television network in the 50 largest television markets (see NOTE 1 to this paragraph) shall devote, during the four hours of prime time (7-11 p.m. E.T. a ' P.T., 6-10 p.m. C.T. and M.T.), no more than three hours to the presentation of programs from a national network, programs formerly on a national network (off-network programs) or feature films which have previously appeared on a network: provided, however, That the following categories of programs need not be counted toward the three-hour limitation:

(1) Network or off-network programs designed for children, public affairs programs or documentary programs (see NOTE 2 to this paragraph for definitions).

(2) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or other material related to such coverage, and political broadcasts by or on behalf of legally qualified candidates for public office.

(3) Regular network news broadcasts up to a half hour, when immediately adjacent to a full hour of continuous locally produced news or locally produced public affairs programming.

(4) Runovers of live network broadcasts of sporting events, where the event has been reasonably scheduled to conclude before prime time or occupy only a certain amount of prime time, but the event has gone beyond its expected duration due to circumstances not reasonably foreseeable by the networks or under their control. This exemption does not apply to post-game material.

(5) In the case of stations in the Mountain and Pacific time zones, on evenings when network prime-time programming consists of a sports event or other program broadcast live and simultaneously throughout the contiguous 48 states, such stations may assume that the network's schedule that evening occupies no more of prime time in these time zones than it does in the Eastern and Central time zones.

(6) Network broadcasts of an international sports event (such as the Olympic Games), New Year's Day college football games, or any other network programming of a special nature other than motion pictures or other sports events, when the network devotes all of its time on the same evening to the same programming, except brief incidental fill material.

NOTE 1. The top 50 markets to which this paragraph applies on the 50 largest markets in terms of prime time audience for all stations in the market, as listed each year in the Arbitron publication Television Market Analysis. This publication is currently issued each November, and shortly thereafter the Commission will issue a list of markets to which the rule will apply for the year starting the following September.

NOTE 2. As used in this paragraph, the term "programs designed for children" means programs primarily designed for children aged 2 through 12. The term "documentary programs" means programs which are non-fictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself.

APPENDIX B

Parties filing Comments in response to "Further Notice Inviting Comments"
Docket 19622

* Reply comments only
** Initial and Reply comments
No indicator - initial comments only

Government Agencies

Department of Justice, U.S.
Office of Telecommunications Policy

Citizens or Public Groups

Action for Children's Television
* Alabama Media Project and Civil Liberties Union of Alabama (joint)
American Association of Retired Persons and
National Retired Teachers Association (joint)
* American Civil Liberties Union
Bilingual Bicultural Coalition
Committee for Open Media, Minneapolis-St.Paul
Community Coalition for Media Change
Consumers Union
Grand Rapids Urban League
Media Access Project
** National Black Media Coalition
National Citizens Committee for Broadcasting
National Organization of Women
National Urban League, Inc.
Oakland Media
* Public Rights in Media
Puerto Rican Media Action and Educational Council, Inc.,
National Latino Media Coalition and Puerto Rican Legal Defense
and Education Fund, Inc. (joint)
Raza Association of Spanish Surnamed Americans
* St. Louis Broadcast Coalition
San Francisco Committee on Children's Television
Youngstown Area Urban League

Industry, Professional and Labor Associations and Organizations

Association of Independent Television Stations,Inc.
Authors League of America, Inc.
Motion Picture Association of America,Inc.
** National Association of Independent Television Producers and Distributors
National Committee of Independent Television Producers
Screen Actors Guild, Hollywood Film Council, and Writers Guild of
America, West (joint)
Station Representatives Association

Networks

** American Broadcasting Companies, Inc.
** CBS Inc.
** National Broadcasting Company, Inc.

Other Station Licensees

KOOL Radio Television
Leake TV, Inc.
Metromedia, Inc.
Newhouse Broadcasting Corp.
* Post-Newsweek Stations, Inc.
** Westinghouse Broadcasting Company, Inc.
Wometco Enterprises, Inc.

Film Companies and other Program Suppliers

Bill Burrud Productions, Inc.
Columbia Pictures Television
** MCA Inc. and Twentieth Century-Fox Television (joint)
** Sandy Frank Program Sales, Inc.
Time-Life Films, Inc.
Viacom International, Inc.
** Warner Brothers Television, United Artists, Inc. and MGM Television (joint)
The Wolper Organization, Inc.

APPENDIX C

Summary and analysis of initial and reply comments filed in response to the "Further Notice Inviting Comments" in Docket 19622.

I. Comments of Government Agencies and Public Groups

A. Department of Justice and Office of Telecommunications Policy

C-1 - As suggested by the Court, the Commission sought the views of the Department of Justice concerning the rule and the national policy favoring competition. The Department filed rather brief comments in letter form, noting its earlier expressions of support for this and related rules as consistent with the overall objectives of the antitrust laws to maintain and enhance competition in broadcasting. The Department reiterated its belief that, given a reasonable chance, the rule could be an important first step in fostering diverse, independent program sources and curtailing undue network control over programming. It is asserted that the rule has not really had such an opportunity to work, because of the surrounding uncertainty almost from the beginning. Therefore, while the suggestion that the rule actually works to increase network dominance might be important if correct and if the rule had had a reasonable opportunity, "empirical evidence is not yet reliable in this matter", and until there is such an opportunity "there is no possibility of determining what the resulting competitive relationships are," since the Commission must be concerned with long-term effects and since it takes time and stability to develop and market independent programs. Accordingly, it is urged that fairness requires that the rule be given a decent opportunity, and the original rule should be reaffirmed, with a statement that it will be retained for a suitable period such as five years. This, it is claimed, will give a reasonable chance for new production capability, and related syndication, financial and promotional services, to develop. Such a period will also give the Commission an opportunity to gather evidence as to the rule's effects.

C-2 - OTP. OTP's comments urge repeal of the rule. It is claimed that the rule has had precisely the opposite results from what was intended, and has led the Commission undesirably into judgments as to program content in connection with waivers. It is stated that the rule appears to have artificially constricted prime time and thus strengthened the networks' position and weakened that of the U.S. production industry, contrary to the objectives. Attention is called to the OTP's March 1973 study of re-runs and related issues (which is incorporated by reference) 1/, where OTP concluded that the rule should be repealed since it is one of the major causes of the decline of the TV production industry. In a letter to then Chairman Burch transmitting this report, OTP urged repeal on the basis that the rule (and re-run practices) "limit the amount of diverse, original and high-quality programming available in prime time to the American public" as well as weakening the production industry; "there are enough anticompetitive forces at work in TV without the Government adding more." The second line of argument, concerning programming judgments and Constitutional problems, is similar to that made earlier and now by other parties and discussed below; OTP believes that this kind of judgment is at least as objectionable when made in the form of a rule like PTAR II (with its "preferred" program categories and "paragraph 88" statement concerning locally significant programming), which "has cast the case-by-case evaluation of program content of previous waiver procedures into the rigid mold of a rule." In sum, the rule has had a sufficient test and has been found wanting.

1/ Analysis of the Causes and Effects of Increases in Same-Year Rerun Programming and Related Issues in Prime-Time Network Television (Office of Telecommunications Policy, March 1973). The Report found that there had been a decline in original network prime-time programming of 662 hours for the year 1971-72 as compared to 1962-73, 343 hours of the decline resulting from increased rerun use and 319 from the prime time access rule (or 51.8% and 48.2% of the total decline respectively). More data was given for CBS and its decline of 389.1 hours; it was stated that 35.4% of this decline resulted from increased use of theatrical movies (not made for TV), 33.4% from the prime time access rule and 31.1% from greater rerun usage. The Report stated (p.30) that in 1971-72 "cleared" time was devoted almost entirely to non-original programming instead of original and rerun network programs; whether this would continue in the future is not clear, "but it does seem likely that access time will probably be devoted to programs of lower cost and lower employment than network programming."

B. Views of "Public" Groups and Members of the Public

C-3. The 21 initial or reply comments from public groups supporting FTAR I represented a wide range of groups -- a major consumer group (Consumers Union or CU); National Organization of Women (NOW); Action for Children's Television (ACT) and San Francisco Committee on Children's Television; a number of minority groups including National Black Media Coalition (NBMC) and the National Urban League (Urban League) and affiliated local chapters concerned with Black affairs; Puerto Rican Media Action and Educational Council, Inc. and two other Puerto Rican groups filing jointly; Raza Association of Spanish Surnamed Americans (RASSA) and Bilingual Bicultural Coalition (BBC) concerned with Chicano matters; and a number of groups interested in civil rights or changes in broadcasting to make it more responsive to what they regard as the needs and interests of the community (including minority-group interests), including the American Civil Liberties Union (ACLU) and one of its chapters, National Citizens Committee for Broadcasting (NCCB), Media Access Project, and activist groups concerned with television in the San Francisco Bay, St. Louis and Twin Cities areas and in Alabama.

C-4. The common thrust of all of these comments is the importance of localism in broadcasting, and the furtherance which the original rule gives to this objective. It is claimed that the licensee has a responsibility to the members of the community of license, including members of various minority groups in that community, that the broadcaster is better able to meet the interests of his community and minority interests through local programming, and that to be able to provide such local material, the licensee must have a full hour of prime time each evening during which he is free from the pressure of the national television network with which he is affiliated. Most of these groups cite paragraph 88 of the January 1974 Report and Order. This paragraph urged licensees to make use of some access time to present programming of importance to minorities, children, and the particular needs, interests and problems of the local community. It is urged that there is now an on-going dialogue between licensees on the one hand and citizens groups in their communities on the other; but for this dialogue to be meaningful there must be prime time available, free from network programming and the concomitant pressure on stations to carry it. NCCB claims that the rule frees licensees to use their judgment and exercise their responsibility to present programs meeting the needs, interests and problems of their communities, as emphasized in the Commission's 1960 Program Policy Statement; NOW claims that with the exclusion of network programs from this period, stations will look for significant material which particularly meets local needs and problems. ACT asserts that there is developing a meaningful dialogue among stations, parents and professionals concerned with children's programming, resulting in meaningful local efforts. The Puerto Rico comments claim that the rule is the only thing making it possible for minority producers and minority-business advertisers to get access to prime time. Oakland Media asserts that to the extent local programming of this sort is presented in prime time, it is more likely to get advertiser support and thus can be more elaborate and attractive programming, rather than simply a taped studio panel discussion.

C-5. Some of these groups call attention to particular local programs run in prime time which they regard as significant in meeting these particular needs, such as children's or minority affairs material or meaningful programming for women. NBMC lists arrangements with licensees in 14 cities looking toward the presentation (and in some cases station production) of prime-time programs concerning minority affairs and problems, programs concerning women, etc. (in most cases these contemplate monthly or less regular programming, but the agreement with WNBC-TV, New York City, is said to call for 50% of its weekly prime time documentary New York Illustrated series to be geared to the needs of minority communities, and an agreement with a Lansing station concerns a weekly public affairs program). 2/ NBMC also refers to a Broadcasting article (July 15, 1974) listing 14 local non-news access-period programs (mostly public affairs) planned on the 15 network owned stations for this fall. NOW lists programs of significance to women, presented on network affiliates in six cities (Pittsburgh, Washington, Boston, Cleveland, San Francisco and Columbia, S.C.), including (all in the access period) one weekly women's series (Washington), two weekly series with women hostesses and frequent discussion of women's topics, four other weekly series often dealing with women's problems, 3 all-women monthly programs, two monthly programs sometimes dealing with similar subjects, and 27 other specials or irregular programs (all were prime-time programs, and all but a few of the irregular programs were in the access period). ACT calls attention to the Jabberwocky program presented in access time in Boston and later syndicated, as well as to the presentation of the syndicated Black Beauty series in access time. San Francisco Committee on Children's TV states that the San Francisco affiliated stations have begun to present access-period children's programs reflecting an understanding of children, consulting community advisors for this purpose and two hiring professionals to produce the programs. Weekly access-period local programs in Grand Rapids and San Antonio, wholly or often devoted to programs related to Blacks and Chicanos respectively, are also mentioned, as are a few programs in other cities.

C-6. On the other hand, some comments state that the situation in their areas in this respect is still poor, and that therefore not only should PTAR 1 be retained, but further Commission efforts should be made to insure that proper use is made of access time. See par. C-13, below. The St. Louis group claims that there is no local programming in access time on the St. Louis affiliated stations, and one of the Bay area groups states that minority-interest programs on the San Francisco stations are either non-existent, presented at an undesirable time, or lack real relevance.

2/ In this connection, see the discussion of the reply comments of MCA Inc. et al, par. C-43, below.

C-7. A few of these groups assert another advantage flowing from the rule and its impetus to local programming -- the increased employment of local people, particularly members of minority groups, in connection with such programming. It is claimed that there is increased minority involvement in the programming process, although some groups claim that there is still widespread discrimination, particularly at the higher levels.

C-8. As to the significance of network programming in meeting these special needs, the groups who discuss this claim that network programs are not of any value in this respect. The Puerto Rican comments claim that up to now neither network nor individual station programming has given much recognition to Latinos; what programming is presented is "exclusively limited to racial parody and the perpetuation of a poor ethnic stereotype." BEC claims that, while network programs can be vital and effective, NBC's highly successful new Chico and the Man series, though well-intentioned, fails to recognize the differences between Puerto Ricans and Chicanos and their barrios -- another example of callous Gringo indifference to Latino culture. This is said to be an example of the inability of network programming, designed for the mass audience, to take into account individual local cultural aspects. NOW claims that network programming presents a distorted picture of women -- males are in authoritative and superior roles, whereas women are uniformly portrayed as "frivolous, childish, flighty, undependable, overemotional, and generally in need of masculine guidance". With few exceptions, it is said, women are in supporting roles, are victims of ridicule or violence, or do not appear at all. NOW advances statistics showing that in 1974-75 network prime-time programs (63 hours), only 4.5 hours have female leads, 2.5 hours of that in comedy (for the first time in several years, there are two dramatic programs with female leads). They are totally excluded from many programs except as occasionally a "sex object, nurse, secretary, teacher, or more often than not, mother and homemaker." The San Francisco Committee on Children's TV notes the absence of minority children in network programs (citing a monitoring study on a Saturday in late 1972, presented in its 1973 testimony in the children's proceeding): 17 of 27 programs were entirely "Anglo white"; blacks appeared in 8 programs, and Spanish-surnamed and Chinese children in one each, in a stereotyped or derogatory position. This compares with nearly 70% non-white children in the San Francisco public school system.

C-9. It is claimed that without PTAR, the prime-time periods now devoted to such material will be irretrievably lost to the networks, and the kind of locally significant programming mentioned will be presented, if at all, only in traditional "throwaway" or "ghetto" periods such as Sunday morning. To some extent, these arguments by the groups assume no rule -- or total repeal -- rather than modifications of the sort adopted in PTAR II. However, a number of the groups assert that such modifications of the rule would make it more difficult for public groups to get stations to present such material in prime time diluting the benefits of the rule in this respect. NOW claims that any increase in network prime time would be inversely proportional to the continued growth of locally significant programming; the Urban League claims that the PTAR II modifications are unacceptable to its constituency, noting that under these, the networks would get back all Sunday prime hours (assertedly highly important to the Black audience which relies heavily on television) and also the removal of restrictions on the first half-hour on other days, cutting down the time available for local material and tending to preclude hour-long programs. Urban League states that the exemption in PTAR II for network or off-network documentaries, public affairs or children's specials is no balm; the industry has an obligation to educate as well as to entertain, and the Commission's job is to create a vehicle through which licensees, working with the community, can carry out the responsibility through ascertaining and meeting local needs. The Grand Rapids Urban League chapter notes a weekly local Black program (Sunday at 10:30) which would be replaced by network programming; in Youngstown, where there is no such programming, the local chapter claims the changes would make it more difficult to get any. NBMC's position is that any cutback in cleared time should be contingent on the network's presenting material using minority talent or devoted to public affairs programs. Some parties assert that no need for any cutback in cleared time has been shown.

C-10. As discussed below, local programming (other than news) occupies only a small part of the access period, raising a question as to how these groups regard the material which fills the remainder of it. Not all of the groups discuss this subject. Some, such as NBMC and ACLU, state that it is too early to evaluate such programming because the rule has not had a fair test; NBMC also claims that, while it is inclined to agree with the complaints about "quality", the same questions apply to network programs, and any test in this area is subjective and dubious from a First Amendment standpoint. Consumers Union, Oakland Media and a few others are critical of the prevalence of game shows, which the former labels as actually detrimental to the public interest; Oakland Media expresses sympathy for the statement of Commissioner Reid, concurring in the January decision, to the effect that if nothing better is forthcoming, the rule should be repealed. 3/ The general position of these parties is that the Commission should eliminate such excesses by examination at renewal time and making clear (by a pronouncement or even in the rule) what it expects in the way of access-period use;

3/ NBMC's position is that a 7:30-8 p.m. weekly block of six game shows and one local program is preferable to 7 "network-quality" action-adventure or comedy shows.

these suggestions are noted in paragraph C-13, below. A few parties, including NBMC, claim that the limited range of syndicated programming reflects the uncertainty prevailing up to now as to the rule, and that with an affirmed and strictly enforced PTAR, more varied syndicated material will develop, including programs of particular concern to minorities like Black Omnibus and La Raza. 4/

C-11. Increased advertising opportunity and the commercial level in access-period programs. Some of the group comments -- those of BBC, Oakland Media and the Puerto Rican groups -- assert the importance of the rule in making time available to small and local businesses, particularly minority-owned businesses, which cannot afford or profitably use network time and need the opportunity afforded by the rule for local messages. It is claimed that the PTAR II change which would have removed any restrictions from the 7-7:30 p.m. period would be highly disadvantageous in this respect. Oakland Media asserts that local advertisers not only benefit but can be looked to for support for relatively ambitious local programming efforts in access time if the rule is retained in its original form (no specifics are given).

C-12. The other side of this coin -- the increased level of commercials during access time as compared to network programming -- did not draw much comment from these parties. Oakland Media suggests that the Commission or the N.A.B. -- and the public expressing its views -- can deal with excesses in this area. The Puerto Rican comments suggest that it is a problem resulting from monopolistic practices of licensees and networks with respect to prime time generally (this argument is not spelled out in detail). Consumers Union regards game shows as the chief offenders in this respect, and "actually detrimental to the public interest", intertwining program content and commercial promotion and thus increasing commercial content in the access period to far beyond andy acceptable standard. It would meet this by discouraging or barring game shows, including an anti-stripping rule and a rule barring game shows which are additional episodes of network daytime programs.

4/ Black Omnibus is a weekly series which started in January 1973 and ran on a number of stations, including some in prime time and the access period, but is no longer produced. According to NBMC, the stations carrying it were anxious to continue, and General Motors, one of the original sponsoring advertisers, was again anxious to buy time, but "internal problems" led to termination. Another party claims that the failure represented lack of advertiser support, and that it takes time for advertisers, as well as stations and others, to become accustomed to the rule. La Raza is a series of 9 one-hour programs on the history, culture and life of Mexican-Americans, produced for McGraw Hill and shown in access time on its Denver station, and available for syndication.

C-13. Other steps urged by the proponent groups. Many of these groups urge that the Commission take steps to see that the time thus cleared of network and off-network material is used consistently with the "localism" objectives -- something along the lines of paragraph 88 of the January 1974 decision, but going further. The St. Louis group and one of the Bay Area groups go furthest, proposing rules requiring that all of the access period be used for local material of significance to minority groups, children, or other elements of the community such as the elderly, public affairs or documentaries, or public access time (particular proportions were suggested). Consumers Union urges that the rule provide that access time is to be used primarily for local news and public affairs material, programs using local talent and contributing to local self-expression, and programs serving the needs of minorities and children, and also proposes rules aimed at game shows -- barring stripped programs and those which are additional episodes of daytime network shows. Other parties make less sweeping suggestions, such as guidelines or a more definite statement as to what the Commission expects, and evaluation at renewal time of station's past and proposed use of access time (one party suggested a triple credit for a local public affairs program in prime time). Oakland Media suggests that it be made clear to stations that one dimensional access-period programming such as virtually all game shows would not be favorably viewed at renewal time; NOW requests a statement that access programming should include programs relating to the changing role of women. NBMC suggests in reply comments that two access periods a week be available to networks and national syndicators to use for local interest programs; if they do not do so, the time would revert to the station for the same purpose. ACT, supporting PTAR I but with an exemption for network children's or family specials at 7:30, also urges that the time from 5 to 6 p.m. be limited to children's programming.

C-14. A number of these groups also express opposition to various kinds of waivers which have been granted under the rule, as inconsistent with the above considerations, e.g., "one-time" network news and public affairs, sports runovers and pre-game and post-game shows, the "Summer Olympics" type of situation, and waivers for particular off-network programs. Some of them also join private parties in advancing various ideas discussed below, such as the need for certainty and the absence of a fair test of the rule so far, the undesirability of Commission judgments based on types of programs and program quality , and similar considerations.

C-15. Statement from citizens groups opposing the rule. The only views by citizens groups opposing the rule were set forth in a letter filed by the legislative counsel of the American Association of Retired Persons and the National Retired Teachers Association, two affiliated groups assertedly having a total membership of more than 7 million persons, who have unusual opportunities to watch television because, in the main, they are retired. Asserting that the rule would have increased the diversity and innovation of access-period programs if it had worked as anticipated, the letter claims that in fact it has not so operated, but instead has resulted in an abnormal number of game shows and similar programs, with deteriorating diversity as a result -- material catering almost exclusively to the younger consumer with the elderly having a small part

to play in the programs. The letter also expresses generally the same views as the "majors" and other opponents of the rule, that it has discouraged the production of "high quality, network-caliber programs with opportunities for the use of creative American talent." The ban on feature films during access time, along with "popular programs which previously appeared on the networks", is also noted. It is claimed that the rule has had a fair opportunity and has signally failed. It is said that network profits increased (hardly a reason for continuing the rule); and it is claimed also that minority groups are under-represented in access-period shows both as to employment opportunity and treatment of relevant social issues. Therefore, since there is no reason to believe that further experimentation would improve its performance, it should be repealed.

C-16. Letters from members of the public. In view of the interest expressed by the Court in the views of the public, we note here the expressions in some 75 letters and cards received by the Commission from the beginning of 1974 to mid-September, concerning the rule and related matters, which were put in the docket in this proceeding in late September along with the initial comments in Docket 19622. Aside from 7 letters from producers interested in particular programs (two for the original rule, five either urging repeal or disapproving of the Court's decision staying the January relaxation of restrictions), there were 35 letters from parents, children or others objecting to the rule because of the late starting time for children's specials as it works in practice; 12 writers were against the rule generally (often mentioning game shows in particular); 3 supported the rule (one in favor of game shows); one objected to the "off-network" restrictions because of its ban on access-time showing of one particular program; two expressed objection to the fact that National Geographic specials will not be on network TV this year; 5/ and 16 objected to "an FCC ruling" which, the writers seemed to believe, would result in the non-presentation of certain popular programs on weekend evenings (including Hee Haw and Lawrence Welk, but also Apple's Way and Disney and in some cases other material such as Wilburn Brothers and Buck Owens). The latter were apparently based on erronious interpretations of a somewhat ambiguous TV Guide article, and their significance is thus rather limited about half of them appeared to regard all four of the programs first mentioned as network material and objected to the idea of terminating them in favor of locally originated programming). However, they do seem to indicate that the writers like these particular programs, and would be to that extent disadvantaged by a rule giving Saturday night back to the networks for children's programs or news-documentary material.

5/ Other letters concerning the National Geographic cancellation have been received. It appears that this cancellation is not necessarily connected with the return to the original rule, but possibly, rather, to the lateness of the Court's decision restoring it, in relation to the 1974-75 year. CBS, which was to carry it, stated that in the cutback from planned scheduling following the Court's decision, it eliminated National Geographic, for which it did not yet have a firm contract commitment, and kept other shows for which it did have such commitments. The program was on a network during the three previous years of the rule, first CBS and then ABC.

II. Material concerning specific questions listed in Further Notice

C-17. There is summarized in this section the material concerning the six specific points concerning the substance of the rule mentioned in the Court's opinion and in the Further Notice inviting comments, pars. 6-10 and 13. The views of public groups as to the last two questions -- the rule and programming of significance to minorities, and increased commercial level and increased advertising opportunity -- have already been discussed and will not be repeated. The same is true of the views of the Department of Justice and OTP on other questions.

A. The "Rule increases network dominance" argument.

C-18. Several of the opponents of the rule -- the 'majors' (particularly the Warner Brothers' comments), and SAG et al -- urge as before that the rule has been counter-productive with respect to its major objective, decreasing 'network dominance', a point also advanced in last year's Pearce Report. Others, such as licensees Newhouse and Metromedia, assert that it certainly has not been lessened. 6/ The argument, set forth most extensively by Warner Brothers and MCA, is based on the following contentions:

(a) The rule creates an artificial scarcity of prime time available for network programs (reducing it from 75 to 63 hours a week for the three networks), thus increasing the dominance of the networks over it in two markets: (1) as three sellers of advertising time vis-a-vis hundreds of potential national advertisers; and (2) as three buyers of prime-time programs vis-a-vis more than a hundred producers offering network program material. Thus, it is claimed, the networks have been able to raise the prices for an average prime time commercial minute from $50,000 in 1970 to $68,900 in 1973, and (according to Warner's estimate) to $75,000 in late 1974; at the same time, the prices they have paid producers for programs have increased only about 10%. MCA's figures for the latter are averages for one-hour network shows produced by MCA of $243,000 per episode in 1973-74 compared to $222,000 in 1970-71. Thus, claims MCA, the networks are able to increase their profits to the extent of the difference between $113,400 per hour increase in time charges (6 minutes an hour) and $21,000 increase in programming costs. The increased advertising costs are assertedly passed on to the consumer.

(b) The network lock on network prime time is increased because station preemptions or non-clearances are down. No specific figures are given in support of this claim; there is reference to statements to this effect on earlier pleadings of ABC and one licensee in Docket 19622, and a February 1973 Variety article to the same effect. In 1970, ABC predicted that the rule might offer the benefits of option time, and Warner Bros. now claims that ABC was correct in this respect.

6/ Metromedia's argument is that, by now working to the disadvantage of independent stations vis-a-vis network-owned and affiliated stations, the rule weakens the former, which are the only real counterbalance to network domination. See par. C-31, below.

(c) Network dominance continues to operate in access time because the sale of an access-period program to an owned-station ("O&O") group is vital to the program's success. Warner cites statements to this effect by NAITPD and its members in seeking a stay in Court last February -- sales to O&O's are the "primary sale", accounting for nearly half of the gross revenue and in effect underwriting the costs (NAITPD); the "principal financial support" (Filmways), "very important" (Time-Life); and "few access shows can make it in the rest of the country if they can't first land the major dollars of the network powerhouses." (Broadcasting, July 15, 1974). The Pearce Report is to the same effect, as was the testimony of 20th Century Fox at oral argument in July 1973.

(d) That the rule strengthens the networks' position is shown by two of the networks supporting the original rule in mid-1973 (ABC and NBC), with CBS not vigorously opposing it, by their tremendous increase in profits from 1971 to 1973 (roughly $54 to $185 million) and by stock market analyst opinions favorably describing their situation for these reasons, including firmer advertising rates and ability to dispose of marginal programs because of the lessened time. 7/

(e) Warner claims that the rule has resulted in the networks producing more of their own programming, to the detriment of the majors and other independent producers, for example ABC and CBS producing in-house much of their movie-of-the-week material (citing the Pearce Report).

C-19. Counter-arguments by proponents of PTAR I and NBC. Rule proponents NAITPD, Sandy Frank, Westinghouse and ABC -- plus NBC, which may be considered a proponent for the purposes of this argument -- answer these contentions in various ways. 8/ Generally, it is claimed that the rule was not intended to be an "anti-network" measure, e.g., to reduce network profit levels, 9/ but simply to limit network control of station program time to bring it down to the level which the Commission considered to be in the public interest. This it has obviously done, and arguments that this reduction is outweighed or equalled by the other considerations mentioned are clearly wrong (NBC labels them "sheer nonsense"). ABC claims that 'network dominance' is somewhat a pejorative characterization; there will be only three networks as long as the present TV allocation structure exists. It calls attention to the fact that

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7/ Warner quotes reports by investment analysts Coleman & Co. and Tucker Anthony and Day (both mid-1974), describing the networks' position favorably for this reason. The Coleman report states that the Court's decision has "tightened prices and brightened the outlook for the 1974-75 selling season" and "it is likely that this will tip the supply/demand balance to a sellers market". In other words, the rule has benefitted the networks by reducing their inventory of commercial positions.

8/ CBS does not discuss this subject at length, urging repeal of the rule for other reasons and disputing the network dominance arguments as unsupported in the record.

9/ ABC and NBC refer to numerous past Commission pronouncements in other proceedings, as to the importance of and benefits from commercial networking; NBC devotes most of its initial comments herein to a discussion of this subject, urging the Commission to call the Court's attention to this aspect of the matter.

network gross revenues, as a percentage of total TV gross revenues, have declined every year since 1966. NBC asserts that network programming makes up usually only a small part of the programming available to viewers; each network's total entertainment schedule makes up only about 12% of the total programming on the 231 commercial stations in the top 50 markets, the total network schedules from 6 to 11 p.m. make up only about 16% of total programming during those hours on those stations (more than 50% of programming, total and 6-11, is non-network). Westinghouse claims that the rule obviously serves to limit network dominance in the respect mentioned; if there are problems otherwise, they should be dealt with by other Commission action aimed at them, rather than reducing this control on network dominance. Sandy Frank suggests that the reason for network support of the rule may simply be that it has enabled them to get rid of the troublesome 7:30-8 p.m. time period, which has less audience than later and has presented programming problems.

C-20. Network relations with advertisers and producers. As to the first contention of this argument -- subpar. 18(a), above. Westinghouse claims that if the Commission is to give any credence to these concepts, it would first have to explore them in detail, in a proceeding involving use of subpoena power since the factual material involved is not likely to be forthcoming in a regular rule-making proceeding; certainly they can afford no basis for regulatory action at this point. Frank's argument is to the same general effect, that this is not the Commission's concern as long as there are no antitrust violations; any Commission regulatory concern about network-producer relationships would involve a determination as to what the competitive balance should be and would require a continuing review of that situation. NAITPD and ABC urge that both of the supposedly harmed groups -- potential national advertisers and producers for the networks -- now have an alternative in the form of viable non-network programming, which they can use or produce if they choose to do so, for example if their arrangements with the networks are unsatisfactory (and which of course is a greater alternative under the original rule and less under the modification). ABC points out that many large advertisers use both network and national spot commercials; and asserts that the relationship between networks and national network advertisers has not discouraged new entries into the latter group in recent years -- 11, 14 and 15 in new national advertisers in the last three years respectively, compared to only 3 new in 1970-71, with 97 companies (spending some $50 million) represented in 1973 schedules but not in 1972. ABC also urges that, while obviously the cutback in network prime time has tended to firm up and stabilize the market for commercial positions, this is in the public interest since it provides an economic base for three competitive networks instead of the "two and one-half network economy" previously existing. ABC also urges, as to the matter of prices to producers for programs, that this may represent other factors such as the overall economic situation (price controls, etc.), as well as the fact that the networks can no longer buy subsidiary rights and therefore pay less.

C-21. NBC deals with these points at length in reply comments. As to the advertising rates point, NBC claims that the showing by MCA et al is a considerable over-simplification, overlooking a number of factors. Thus, there has been a 15% increase in TV homes from November 1970 to November 1973 (60.1 to 66.2 million homes), and an 11.3% increase in prime-time audience. In terms of the highly important "cost per thousand" (CPM), this rate to advertisers has increased from an average of $4.18 in 1970 to $5.12 in the fall of 1973, or 22%, and compared to the earlier year of 1969-70 the increase has been only 15% ($4.45 to $5.12). Daytime network rates have gone up since 1970-71 by 16%. It is also pointed out that the change to 30-second rather than one-minute commercials has affected the situation. It is claimed that the increase is less than the increase in national GNP over the period (32.7%), or in total expenditures on TV advertising (23.4%), or roughly the same as the inflationary increase in the economy generally over the period, 19%. With respect to license fees paid to producers, NBC analyzed all of its prime time made-for-TV entertainment programs from the years 1970-71 to 1973-74 (excluding theatrical films, specials, and NBC-produced programs) 10/ with respect to license fees paid. Its finding is that, using 1970-1 as an index of 100.0, in 1973-74 the fees were 118.9, an increase of nearly 19%, almost exactly the same as the general inflationary increase over the period (the index dipped to 98.5 in 1971-72 and was 110.5 in 1972-73). Moreover, it is pointed out, license fees in 1970-71 also included subsidiary rights -- syndication, profit shares in syndication, etc. -- which networks do not buy now because of the financial-interest and syndication rules, and which have been estimated as worth over $10,000 an episode -- so that the fees paid for network exhibition have actually increased more. 11/

10/ Since this analysis is said to be confined to "made for television" programming, it presumably excludes sports.

11/ Warner and MCA in their comments assert, as they did earlier, that network leverage is increased and that later off-network sales must be relied on for the producing company even to recover costs. NBC expresses some doubt about the real validity of such statements, asserting that these companies include as cost items general expenses and overhead totalling about 29% of total costs, and also a "distribution fee" of 10%. A Broadcasting article cited by some parties (September 23, 1974) discusses the squeeze on producers between high and rising costs and what they receive in network license fees. It is stated that some producers have gone out of business, reducing the number of principal network suppliers from 27 to 19, and one producer is quoted as saying that ultimately they could be reduced to only a few majors who can recover costs in other areas. One problem is said to be the necessity of a rather long network run in order to have enough episodes to sell off-network later and recover costs, and this is difficult in view of numerous mid-season program failures. It is stated that some relief may be in sight through changed network practices, including greater payments for successful shows and an increase in the "short rate" paid producers whose shows do not last. The Coleman & Co. report cited above states that producers have absorbed as much as, or more than, the networks of recent cost increases, partly because of the changed supply-demand balance resulting from the rule.

C-22. Station preemptions and non-clearances in network prime time. As to the allegations about preemptions and non-clearances being down, some of the rule's proponents claimed that this is not true to a significant degree; Westinghouse claims that preemptions were few before the rule and still are; NAITPD claims that the rate was and is about 96 to 98% clearance. NAITPD claims that -- since there is no longer the same economic reason to preempt with local advertising support now channeled into the access period -- the continued incidence of preemptions at all is remarkable, showing a new licensee independence and use of varied syndicated and local material to "up-grade network prime time schedules", instead of only preempting to show local movies as formerly, demonstrating the benefit of the rule in providing an independent program source. Presentation of Hee Haw on WMAL-TV in Washington at 8 p.m., and similar showings of it or Lawrence Welk in network prime time on 8 other stations (mostly outside the top 50 markets) is the example given. ABC gives figures: for 1970-71 the average non-clearance or preemption of ABC programs was 7.1% of U.S. TV homes, down to 3.7% in 1972-73. It believes that CBS and NBC clearances have not been affected by the rule.

C-23. "O&O" purchases as necessary to syndicated program success. Proponents of the rule dispute the claim that "O&O" purchase is so vital to a syndicated program's success, certainly not compared to the total "veto power" which network control of the same time period represents (and, of course, this does not apply to local programs at all). ABC asserts that some highly successful shows have not had any O&O exposure -- Lawrence Welk, Hee Haw, To Tell the Truth and Truth or Consequences -- while others have had it and failed (Starlost, Mouse Factory, Dr. Kildare, UFO). In short, it is helpful and more efficient, but not determinative. ABC also points out that it bought only two programs as a group in 1973 and 1974 (plus, in 1974, one joint ABC O&O production effort). NAITPD and NBC make more elaborate factual showings, the former including a distinction between O&O "group" purchases and purchases by individual network-owned stations. NAITPD states that sale to one or more network-owned stations is important, vital in some cases, not because of their ownership by networks but because for many programs -- particularly half-hour weekly programs -- this is the only way they can get prime-time exposure in the three largest markets (there are independents in these cities, but, so far, they are not significant customers for this kind of material, though they will buy hour-long shows for weekend use). Also, such sales are highly efficient, in reaching the greatest audience through the minimum number of stations. Such sales are of less importance in the following kinds of programs: (1) one-hour shows like Hee Haw and Lawrence Welk, which independents will buy for weekend use or use in prime time opposite network shows; (2) barter programs, where the advertiser puts up the financing; (3) programs which are 6th or 7th episodes of stripped daytime game shows; (4) programs of foreign origin, where all or most of the initial cost has already been recovered; (5) some low-budget half-hour weekly game shows; and (6) programs which have a

strong foreign sale. In other words, the problem is getting initial financing, and if it can be forthcoming from one of the other sources involved in the above situations, the problem is less. But if not, as with a half-hour weekly "straight-sold" (not bartered) program, a top-market sale is necessary, and for the most part this is the same as sale to a network-owned station.

C-24. NAITPD also analyzes the O&O group buying practices with respect to the 18 programs distributed or produced by NAITPD members for access use this season (including two no longer in production), and for 13 other syndicated programs bought by network-owned stations. The data is as follows:

(a) 7 of the NAITPD-member produced or distributed shows have no sales to network-owned stations (including Welk, Hee Haw, Truth or Consequences, Kreskin, Merv Griffin and the two no longer in production).

(b) Of the 24 programs bought by one or more owned stations, 9 were sold on a group basis, although usually not for all 5 of the group's stations and in one case for only one, representing a total of 31 stations. 11 were sold to network-owned stations only on an individual-station basis, although sometimes to 2 stations of the same group, such individual sales totalling 21 stations. 4 programs were sold on both bases, to one group for four or five stations and also to one or two stations owned by other networks. Such sales represented 18 stations through group purchases and 5 through individual sale, meaning an overall total of 49 station sales on a group basis and 26 station sales on an individual basis.

C-25. NBC in reply comments points out that (based on material in Sandy Frank and other initial comments, and other sources), of 30 syndicated access programs listed for the 1974-75 season, 11 were not on any network-owned station, and six on only one or two; of 28 leading programs (sold in 10 or more of the top 50 markets as of mid-summer), 9 were on none and 6 on one or two. As to the prior two years, of the 35 leading programs each year, in 1972-73, 10, and in 1973-74, 14, were not carried on any network-owned stations, and another 6 in 1972-73 and 9 in 1973-74 were carried only by one or two such stations. 12/ Of the 35 leading programs in 1972-73, 18 were among the top 35 the following year; 6 had been carried on no network stations and 3 on one or two (9 on three or more). The 1974-75 picture of returning programs from 1973-74 was generally the same. NBC also calls attention to the number of independent stations available to program suppliers in markets where it has stations (e.g., 3 VHF independents in New York and 4 in Los Angeles).

12/ The programs not carried on any O&O station included Welk and Hee Haw, near the top of the list of access-period programs.

C-26. In reply, Warner et al claim that NAITPD's analysis, mentioned-above, merely emphasizes the importance of the network-owned stations to syndication success, and that ABC's analysis of success and failure, noted above, simply shows that an O&O group buy assures access even though not success. It is claimed that virtually all new access shows requiring substantial investment have been purchased for all or most stations in an O&O group (using the term "new" to exclude programs which are "cheap replications of old or current network game shows"). Thus, 5 of 6 "new" programs in 1972-73 were so presented, as were all 4 of those "new" in 1972-73; and the only "new" non-game-show this season (Last of the Wild, shown on 4 CBS stations). "Thus, the networks exercise control over what millions of Americans see in access time across the nation." It is claimed that while group buys have declined somewhat in number, this simply represents the networks leading the stampede to cheaper game and animal programs, away from dramatic and comedy access programs. 13/

C-27. The networks' own production of programs. Warner et al urge another aspect of claimed inordinate network dominance -- the networks' assertedly increased production of their own entertainment material, for example ABC's production of 40% of its made-for-TV movies shown in 1972-73 (made-for-TV movies now make up more than 60% of network feature films). 14/ This, combined with the reduced amount of prime time, increases network leverage and forces producers to sell to the networks below cost (see footnote 11, above), so that the pressure of network dominance on the majors and other producers is even greater than it was before the adoption of the various rules. NAITPD and NBC dispute the claims that network in-house production is significant in amount or has increased; NAITPD asserts that there are only two network-produced series and a small percentage of total prime time movies. NBC analyzes network regular prime-time entertainment schedules for the years 1970-71 through 1974-75, and concludes that network-produced programming has been fairly constant at under 10% of this figure (4-1/2 hours in 1970, 4 hours in 1974, 5 hours in the intervening years), while the amount of programming supplied by the majors has been 65 to 70% of the total in all of these years (39 hours a week in 1970, 1972 and 1974, 41 or 41-1/2 hours in 1971 and 1973) -- 8 times as much as the networks themselves (NBC also notes that the majors are among the largest suppliers of syndicated programming).

13/ The majors' factual appendix shows group O&O use of access-period programs, as follows (programs shown on 3 or more owned stations of a group): NBC: 1971-72, 7 programs on all 5 stations; 1972-73, same; 1973-74, 5 programs on all 3 stations; 1974-75, 4 programs on 5 stations and one program on 4 stations. CBS: 1971-72, 3 programs on 5 stations, 2 on 4 stations, 2 on 3 stations; 1972-73, 5 on 5 stations, two on 3 each; 1973-74, 3 programs on 4 stations, 3 on 3 stations; 1974-75, one program on 4 stations, 4 programs on 3 stations. ABC: 1971, one program on 5 stations, one on four; 1972-73, one on 4 stations, 2 on 3 station; 1973-74, one on 5 stations, one on 3 stations; 1974-75, 2 programs on 5 stations.

14/ According to the Pearce Report (p. 107), in the same season about half of CBS' made-for-TV movies were CBS-produced. ABC predicted in 1970 that this might well be a result of the financial interest and syndication rules and Warner asserts that ABC was correct.

B. The Rule and Competition

C-26. The June 18 Court decision and the Commission's Further Notice following it, discussed the matter of network dominance (above) and effect on competition in separate paragraphs. NAITPD claims that the Further Notice was wrong in this respect; what the Court had in mind was the obvious fact that "competition" is the other side of the coin from "network dominance", and is increased when the latter is decreased. 15/ NAITPD mentions various matters in support of its position that the original rule is highly pro-competitive and should be retained, including the increased number of non-network programs, new production and, equally important, distribution entities (the latter including Viacom, Worldvision and Jim Victory, Inc.), the improved position of independent stations, with more revenues and a greater supply of programs (even though as yet they have largely not chosen to use them), and the increased opportunity for local and other advertisers who cannot afford or profitably use network exposure (including national advertisers wishing to show "specials"). Other proponents of the rule, such as Frank, Westinghouse, ABC and Station Representatives Association mention similar matters, such as a greater number of independent producers; the increased Monday-Friday 7:30-8 p.m. audience shares of independents in 25 large markets (10.9% in November 1970, up to 18.0% in November 1971 and 17.9% in November 1973); and the increased profitability of independent stations (losses of over $20 million in 1970 and in 1971, and profits of $2.5 and 7.7 million in 1972 and 1973 respectively) and decreased UHF losses in the same period, from $40.1 million in 1970 to $10.3 million in 1973. Frank refers to increased competition in programs and ideas. Station Representatives Association mentions the improved condition of independent stations, the increased independence of affiliates, and "the enhancement of competition in the business community by equalizing opportunity for television exposure" among network and non-network advertisers. 16/

15/ NAITPD quotes the following from Mt. Mansfield Decision in which the same Court affirmed the rule in 1971 (the interior quotes are from the FCC's May 1970 decision):

> "... the Commission proposed certain rules designed to 'foster free competition in television program markets' by providing 'opportunity for entry of more competitive elements into the market for television programs for network exhibition' and encouraging 'the growth of alternate sources of television programs for both network and non-network exhibition."
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> . . . . .

16/ ABC also emphasizes the improvement in inter-network competition -- its rise to a position of profitability and parity with the other networks.

C-29. As to the number of producers represented in access-time period programming, Viacom shows, in 1973-74, a total of 63 U.S.-produced programs (excluding religious and farm programs) from 49 producers (31 programs from 25 producers shown in 10 or more markets, the rest in fewer), in addition to 22 foreign programs from 14 additional producers (15 of the latter programs shown in 10 or more markets). 17/ Viacom analyzes network prime time regular entertainment schedules for the same year "second season." (excluding movies not part of a regular series) and finds a total of 54 programs, from 25 producers, including the six majors and 19 other entities. NBC, analyzing the 35 leading access programs for 1973-74 (in terms of number of markets sold), shows them as coming from 26 producers, of which 17 did not have any network programs during the same year. Six of these programs are included in Viacom's list as foreign-produced.

C-30. Among the opponents of the rule, Warner and NCITP, the group of producers who specialize in producing for the networks, claim that the rule is anti-competitive in setting up an "anti-competitive enclave for the cheapest forms of programming" (NCITP), foreclosing opportunities for the majors, and other producers for the networks (more than 75) who cannot use the time because, assertedly, the syndication market will simply not support their "high quality programming which can be supported only by the network syndication process." Warner claims that this is obviously true with respect to network-caliber programs costing $100,000 to $150,000 per half-hour episode, and those producers who tried dramatic and comedy programming on lower budgets (such as $40,000 to $80,000) found they could not compete with game shows costing much less to produce. Warner also claims (as noted in the Pearce Report) that there have been virtually no new entrants into access-period programming as a result of the rule, and urges the extent to which access-period time is devoted to the programs of a handful of producers; for example, the programs of Goodson-Todman and two other game-show producers occupy some 591 half-hours of access time on top-50-market stations, or about 28% of all access time (2,100 half-hours) and about 44% of that devoted to entertainment programs (1,341 half-hours). 18/ In reply comments, Westinghouse, Sandy Frank and other proponents claim that the rule does not exclude the majors and other producers, who can enter the access program production business

17/ The breakdown into foreign and U.S.-produced programs does not appear to be entirely accurate; Wild Kingdom is listed as foreign-produced and The Explorers U.S.-produced, whereas the reverse appears to be true in fact. However, overall the listing appears generally correct.

18/ Viacom analyzes network prime-time schedules for 1973-74 in the same way, showing 29% as produced by MCA-Universal (29 programs), 9% (8 programs) by Warner, 8% (7 programs) by Paramount, 7% (6 programs) by Lorimar, 5%(5 programs) by MGM, and 4%(4 programs) each by Screen Gems (Columbia), Tandem and Quinn Martin. 17 other producers had 2% or 1%. Of the game show producers' total, Goodson-Todman led with 27% of access entertainment time in 1973-74, and 22% this year.

whenever they choose to do so but apparently have chosen to boycott it. 19/ It is also claimed by Sandy Frank that while the number of truly new entrants into production may be few, many dormant companies have revived as a result. ABC claims that it is impossible to evaluate the rule, or PTAR I compared to PTAR II, on an overall basis from this standpoint; some groups have gained and others have lost under either.

C-31. Metromedia claims, as an anti-competitive consequence of the rule and reason for its repeal, the assertedly harmful effect on independent stations resulting from the greater number of advertising positions available for local sale on network-owned and affiliated stations with the reduction in network programming, and with current sophisticated package sales of spot positions by these stations (e.g., three adjacencies to popular network shows combined with a spot in an access-period program). As a result, it is claimed, in Los Angeles there was an increase in spot advertising revenue of $5,021,000 between 1972 and 1973, but all of this, and more, went to the three network-owned stations; independent stations there showed a decline in spot revenue of $1,760,000. It is claimed that independents generally will soon feel this impact even if they have not so far. Warner makes the same point, citing the investment analyst report noted above to the same effect -- the increased local spot inventory of affiliated stations has compounded the volatility of the independents. Warner also urges another point: the reduced network schedules under the rule have meant a decline in the amount of ensuing off-network material, on which these independent stations rely heavily, so that there is a shortage of such material and the price thereof has increased tremendously.

C-32. In reply to Metromedia, Sandy Frank points out that Metromedia's competition for local advertising is not with networks but with affiliated stations, some of them network-owned, and asserts that therefore this is not relevant to any network dominance contention. It is claimed that what Metromedia wants is simply the removal of the added competition (which it does not claim is unfair or illegal), and that this does not justify any change in the rule. ABC asserts that the prosperity of independent VHF stations (which four of Metromedia's are) is not crucial, since they have been profitable as a group for years; more important, because here it is more nearly a question of survival, is the situation of UHF stations, which it claims has improved under the rule (as Metromedia formerly claimed). See par. C-28, above.

19/ In reply, Warner denies that there is any boycott; as shown by the fact that 20th Century Fox has had several access-period programs including some still going, Columbia has had two and MGM one (Dr. Kildare, which failed), and MCA and Warner developed projects but could not get O&O sponsorship. It is claimed that, rather, the market simply will not support quality entertainment efforts which these producers wish to engage in.

C. "Impact on Hollywood" Employment and Production Indu[illegible]y, and Effect on Actors, Playwrights and Other Creative Persons 20/

C-33. Screen Actors Guild (SAG), the Hollywood Film Council, and the Writers Guild (West) urge repeal of the rule in joint comments, because of the impact on Hollywood activity and employment, as does The Authors League of America (with both Authors Guild and Dramatists Guild affiliates). It was also one of the points mentioned in the comments urging repeal filed by Warner et al and MCA et al, KOOL-TV (Phoenix) 21/ and the Office of Telecommunications Policy (OTP). The argument relates chiefly to the kind of access-period programs which have developed (game shows, animal shows and foreign) compared to the 'dramatic' type of network programs lost because of the rule, with only one such U.S.-produced access program in 1973-74, compared to 13 network U.S.-produced dramatic shows in the corresponding time slot before the rule. SAG et al claim that the loss of 12 such network shows means a loss of $34.3 million in annual production payroll. Put otherwise, it is claimed that, at an average budget per 30-minute episode for a filmed series of $140,000, of which $119,000 is payroll, a 24-episode network series involves $3,360,000 or $2,856,000 in payroll -- which, multiplied by 21 time slots lost, is $59,976,000. 22/ The SAG analysis assumes 32 persons per episode of a half-hour film dramatic series, or 768 jobs in a 24-episode series, which in fact represents some 170 fulltime jobs per series, or 3,570 fulltime jobs for 21 series (for 12 series, the number of fulltime jobs on this basis would be 2,040). Warner Brothers estimates more than $60 million a year lost in production expenditure as a result of the rule.

20/ The "impact on Hollywood" question, and effect on creative persons in their professional lives, were mentioned separately in the Court's opinion and our Further Notice; but they are obviously related and are discussed together.

21/ As earlier, KOOL-TV filed a one-page comment, stating this time that the rule results in more money for the station, and higher ratings; but it costs jobs in Hollywood and means poorer programming for the public, and therefore, since the public is the loser, the rule should be repealed.

22/ These figures of course do not take into account whatever gains in employment may result from the rule, in Hollywood or elsewhere. At the 1973 oral argument, the SAG representatives estimated the net loss, taking into account these gains, at $25 to 30 million. Warner claims that any such gains elsewhere have been slight, because of the small amount of local programming in access time (much of which would have been shown at other times anyhow), which is dwarfed in total access hours used by a single game show.

C-34. SAG also advanced statistics concerning unemployment among various guilds and unions, generally similar to those advanced before and including, as of May 3, 1974, 85% of 29,000 SAG members, 89% of 2,780 Screen Extras Guild members. 23/

C-35. SAG et al claim that the Court disapproved of the Commission's ambiguous attitude toward this question, thereby indicating that we should give it greater weight -- and that this cannot be ignored as a factor in formulating basic broadcast policies. Television, it is said, depends on an active, viable and creative talent and production force, and it is an unwarranted assumption that this will remain in being despite all economic and governmental barriers. We cannot continue to erode this capability, this basic natural resource. It is also pointed out that the Commission's 1970 decision and the Court's opinion noted the objective of the rule to foster a healthy syndication industry, so therefore the matter is within the scope of our responsibility, and must be faced. This is more than grounds for concern; it is grounds for remedial action. The presence of foreign product is said to be particularly counter-productive in this respect -- the cause of a healthy syndication business is obviously not served when much of the product escapes the industry entirely.

C-36. The Authors League, whose members write the nation's books and plays, which are often adapted into motion pictures and occasionally for TV programs 24/, claims that the rule has a direct and pervasive effect on professional authors and use of their books and plays on commercial television. It urges repeal of the rule, claiming that it has not improved the quality of commercial TV but rather has spawned a glut of cheap, tasteless material, a deterioration in quality which the viewing public cannot afford. It is claimed that, freed from network domination, stations have failed to heed the lessons taught by public TV, British television and commercial U.S. television in the 1950's -- that stage plays, adapted books and short stories and original TV plays make excellent TV fare and a valuable cultural contribution. The League

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23/ Of 19 other guilds and unions listed, the unemployment percentages of the two largest (16,000 musicians and 3,000 writers) are listed as unknown. Of 5 others with memberships between 1,100 and 1,880, unemployment rates are shown ranging from 29% (property men) to 49% (cameramen), with teamsters 38%, film editors 30.6%, and directors 30%. Two smaller unions, totalling 436 members, are listed with between 50 and 60%; 5 others have between 25 and 50%. These unemployment percentages represent in most cases an increase over corresponding figures given in the earlier SAG exhibit (as of November 1972), although for SAG itself the percentage is the same and for 3 unions it is less than earlier (for the two largest groups other than SAG, the musicians percentage was given as unknown earlier as now, and the writers' percentage was 73% earlier). Screen Extras earlier showed 75% compared to 89% now. Slightly more groups have increased membership than have lost members since 1972, with SAG itself increasing from 25,500 to 29,000, the largest numerical or percentage change in membership. This means that SAG employment is up in 1974 compared to 1972 by some 525, since the unemployment percentage is the same (15%) and membership is larger.

24/ League members are also employed in writing TV scripts, but in this connection they are represented by the Writers Guild.

particularly objects to the restrictions or ban on use of feature film during access time, claiming that this is counter-productive with respect to network dominance by crippling motion picture producers who are the principal challengers to network program dominance, and also that it denies stations fare far superior to the deplorable access-period material which they use to fill the time, as well as damaging one of the country's creative forces, the motion picture industry, and violating the First Amendment. Citing the increased use of foreign product as well as game shows, the League does not ask for any kind of import restrictions, but objects to a rule requiring the broadcasting of a substantial number of programs to replace U.S.-produced material. Moreover, it is said there is no virtue in establishing independent sources of mediocre material (which is what the rule has done); stations are even less interested than the networks in presenting programs of improved quality or meeting the needs of their communities. It is claimed that if the Commission believes that shifting control of program selection is the way to develop independent sources of programming, it should take the access period out of the control of either networks or stations, and give it to representative community groups selected by State Boards of Regents, Arts Councils, etc., who would make the program selection, with a different group controlling the programming for each night (with the station able to set minimum and maximum fees).

C-37. NCITP, the group of producers for the networks, makes generally similar contentions, claiming that its members have a vital interest because they are creative and innovative producers and many were or still are actors, writers and directors, and who are excluded from access time because network programs are barred and the syndication market will not support their type of high-quality material. It is claimed that the game shows fostered by the rule afford no creative opportunity, so that such opportunity is stifled by the rule. The off-network restriction is also attacked because of its restriction on after-market sales generally required for producers to show a profit.

C-38. Impact on the production industry generally. Warner, MCA et al., besides asserting the adverse impact from the loss of $60 million in production expenditure on network programs as mentioned above (as does Columbia Pictures), also argue that the rule has had a serious adverse impact on the independent program production industry generally. The use of access time for inexpensive game shows (involving much less production activity) and of foreign-produced programs (meaning no U.S. production activity), are noted, along with the various aspects of the increase in network leverage over producers, asserted and discussed above (claimed to be far greater than that before the rule). The reduction in the off-network market for former network programs -- assertedly necessary for producers even to break even -- is also advanced, as is the ban on feature films which Warner, MCA et al. seek to sell to stations (see pars. C-66 - 69). Warner claims that while some of the majors are doing well, and better than before (as ABC points out),

this is immaterial (since it resulted from the success of a few theatrical features). It is claimed that television production per se is in jeopardy, that this is a mercurial business with sudden ups and downs, and not all of the majors are doing well (Columbia and, possibly to a lesser extent, MGM). There could also be considered in this connection (though not mentioned as such by Warner) the extent to which producers specializing in network production are assertedly foreclosed from access time, e.g., NCITP's 75 members, and those producers who (according to earlier Warner comments) brought forth some 357 pilots in two years from 1970 to 1974, of which only 57 became regular network series and 24 got some kind of partial exposure. In sum, it is claimed that the Commission has recognized the importance of a healthy production industry (Cable Television Report, 36 FCC 2d 143, 169-170) and in line with this concept the rule should be repealed.

C-39. Arguments of proponents of rule. Of the parties supporting the original rule, four -- NAITPD, Sandy Frank, Westinghouse and ABC -- argue vigorously that this whole area is irrelevant; the welfare of Hollywood is not the Commission's responsibility, and we should simply tell the Court so. 25/ It is also urged by these parties that it would be tremendously difficult and time-consuming to arrive at any real answers in this area -- as to whether, on balance, there is any real loss in employment in the country generally as a result of the rule (rather than other factors), how much relates to matters of efficiency, etc. -- which cannot be decided in this proceeding and would probably require evidentiary hearings. It is also claimed that these are considerations which could apply, and if used here would logically have to apply, in a host of other situations -- stations using recorded rather than live material, types of programs (so that any action on this basis amounts to censorship by encouraging high employment programs such as variety shows, and discouraging other types such as game shows), re-runs, longer programs and sports programs, etc. It is urged that the economic and employment situation in Hollywood results from a whole range of actors and is really not that bad; the majors are all doing better than before, and well (except for Columbia); they still have three hours of network prime time, and could have more time if they were not boycotting the prime time access period. It is claimed that the impact from use of foreign programming is down this year as a result of dollar devaluation. ABC in its June 1973 comments stated that there could well be not so much a loss as a shift in employment, both geographically and by occupation; thus, while dramatic shows employing actors have declined, musical variety shows employing musicians and other artists have developed for access-period use. NAITPD and Sandy Frank also attack the significance of the SAG figures, urging various points: (1) even assuming the analysis is correct, the addition of 21 or so network programs would make only a small dent in the high unemployment figures for SAG and

25/ It is claimed by NAITPD and Westinghouse that this could conceivably be relevant if the situation were such as to jeopardize the entire supply of programs; but this is clearly not the case and therefore the subject is not a legitimate concern.

some other unions; "there just aren't enough hours in an evening to employ SAG's unemployed." (2) the analysis lacks relevance from the standpoint of PTAR because the date of the figures -- May 1974 -- was during the time when the January 1974 modifications were still to be in effect and the networks were presumably working on six additional comedy programs for the expanded time (and some access-period shows had been cancelled); nonetheless unemployment was higher at this time than in November 1972; (3) the SAG analysis is a "circular" one; (4) the failure to take into account gains in employment elsewhere as a result of the rule.

C-40. Some of these parties, plus three others supporting the rule, advance some factual data in support of their claims that overall -- looking not only at simply Hollywood -- the rule has resulted in increased employment. NAITPD compares the 86 syndicated access programs of 1973 with the alleged loss of network programs, and claims that even if these programs involved half the people at half the salary assumed by SAG in its analysis, the payroll involved would still be higher, over $60 million.[26/] In its June 1973 comments, ABC referred to 14 persons added at its Chicago station because of its expanded local news operation under the rule, and Leake TV asserts that it has increased its staff at one station by three, and expenditures by some $50,000 a year at each station, for the same type programming. [27/] Wometco Enterprises, discussing its two successful Miami local programs, says that it has increased its public affairs staff by four persons one plus one temporary employee. ABC calls attention to the total rise in station employment from 1971 to 1974 -- 1,074 persons, or 5.8%, at least partly as a result of the rule. Viacom refers to gains in sales and administrative employment, 18 more for it. Sandy Frank asserts that one of his game shows employs 105 people (not all fulltime), and another 89 work in the studio on this and other productions. It is also pointed out that syndicated programs such as Lawrence Welk and Hee Haw employ large numbers of people just as they did when formerly on networks.

26/ Some of these programs are foreign-produced and thus not properly countable in an analysis of impact on U.S.-production, and others (e.g., sports programs) likely involve little production activity in this sense, or are programs which largely appear outside of access time though occasionally within it, and thus would exist anyhow just as they did before. NAITPD in its comments refuses to answer the questions in the Further Notice as to the number of persons involved in the production of various kinds of access programs, claiming that the purpose for which the information is sought is improper.

27/ According to a Commission staff analysis of access-period programming on top 50-market affiliated stations as of September 1974, 11 such stations present hour-long newscasts during access time on weekdays.

C-41. With respect to the argument concerning a "healthy industry", Sandy Frank urges that while the television industry needs this as a general matter, the Commission has neither the authority nor the ability to restore pre-1948 conditions in Hollywood. NAITPD also asserts that the rule, by permitting certain syndicators to be highly successful, has enabled them to acquire capital from which they can finance their own and other independent producers' network efforts, financing which is particularly needed now that the networks cannot acquire subsidiary rights in programs and therefore advance initial financing only to the extent of the network license fee. It is claimed that truly independent producers are thus able to enter into the business of producing for the networks. Worldvision and Viacom are cited as examples. 28/

D. The Rule and Minority Programming

C-42. The views of public groups, strongly supporting the rule because of its impetus to local programming of significance to minorities, have already been discussed. Some other proponents of the rule make similar points and, in reply comments, note this with approval as indicating that PTAR I should be retained. In support of the contention that network programming is of no significance in this connection, NAITPD notes a recent attack by a Black feminist organization on the network program That's My Mama, as being "racist and sexist", with an "interfering matriarch" mother who has no other role in life except woman's work of cooking, cleaning and being a good servant, and also including male stereotypes such as a young man encouraging the image of "pimp, pusher and stud" and two older men "of no further use to society." 29/

28/ Sandy Frank advances an additional point: as to the impact on creative persons, it should be remembered that in this sense these are as much "private parties" as any others, and the Commission should be careful in evaluating their comments because there may be others in the same category with different views, for example those represented by other union or professional groups. It is noted that AFTRA, the union which represents actors in taped (as opposed to film) TV programs, did not file comments herein.

29/ Washington Post, October 5, 1974, p. B-8. It is claimed by the group that this program exemplifies one of six problems presented by network programs from their standpoint, which include "a lack of roles for blacks as professional working people, portrayal of older blacks as 'shiftless derelicts or Uncle toms', and 'black shows slanted toward the ridiculous with no redeeming counter-images.'" The views expressed by this and other groups are not the only opinions about network programming involving minority-group members. Carl Rowan, the well-known Black journalist and former head of U.S.I.A., in a column appearing in the Washington Star-News on November 6, 1974, stated that he had been asked why he did not attack Sanford and Son and Good Times as shows that libel and defame black America. He continued by expressing a rather unfavorable opinion of the former program, although not for this reason -- "one unhostile boo" -- but he regarded Good Times as unfairly criticized and attractive -- "two gusty laughs". "This Good Times family is in just enough disarray for millions of blacks to be able to relate to it, or maybe learn something from it."

C-43. Opponents Warner, MCA and CBS refer to the comments of the citizens' groups supporting the rule because of its impetus to minority and other local programming, and claim that whatever the benefits of the rule in this respect (which have been small), this is simply too high a price to pay for the lack of diversity which has resulted otherwise -- 66% of entertainment time devoted to game shows, etc. 30/ It is claimed that the rule is not necessary for this purpose, since locally significant programming can be and has been presented at other times; CBS claims that, for example, it could be done at 7 p.m. by stations who run network news earlier, and in 1970-71, before the rule, CBS refrained from programming one half-hour of prime time a month which could be so used. CBS also claims that prime time is not necessarily best anyhow; its 60 Minutes program has a substantially larger audience on Sunday at 6 than it formerly did on Tuesdays at 10 p.m. It is also claimed that furthering this kind of programming was not the real purpose of the rule and thus represents a distortion of regulatory objectives, and presents serious Constitutional questions -- establishing types of 'preferred' programs and cutting down diversity for all viewers with respect to the great bulk of access-period programs with very little gain for a few as to a very small amount of time. 31/ MCA attacks the National Black Coalition's showing of minority-interest gains in 14 cities, claiming in only two of the 7 in the top 50 markets do these involve prime time to any extent, and generally that the agreements are not as specific in this respect as NBMC claims. 32/ Warner also calls attention to the one group comment favoring repeal of the rule -- American Association of Retired Persons and National

30/ In a Supplemental Joint Appendix, the majors state that in the top 50 markets in access time, there are a total of 120 hours devoted to local public affairs programs, but only 11 of these, or 1/2 of one percent of 2,100 half-hours, are minority-interest material. This appears lower than what is the case in fact; for example only 1 program in Washington, D.C. is included.

31/ Warner claims that if the justification for the rule is to promote this kind of programming, it is unconstitutional as an 'over-broad' restriction on First Amendment rights, since it impairs the program diversity for a great many more persons. If the Commission wants to pursue this objective, it should do so directly. MCA asks: "Is the public required to bear the burden of a five-fold increase in game shows during access time so that the public interest groups will have a bargaining chip to throw on the table at renewal time?" It is claimed that the increase in this kind of programs results from factors other than the rule.

32/ MCA disregards 8 of these markets as being outside the top 50 and therefore not related to the rule. This does not follow. Since, as the rule has worked out, the same amount of network programming is presented in the top 50 markets as elsewhere, an increase in time devoted to network programming would have the same effect, other things being equal.

Retired Teachers Association -- stating that this represents the views of over 7 million persons, heavily dependant on television; and that not even the existence of Lawrence Welk, with its appeal to the elderly, is for these people enough to justify being subjected to a glut of game shows and deprived of many attractive network programs. Warner also refers to two Black persons who testified at the 1973 oral argument (Clarence Jones and Dr. Bernard Gifford) who are interested in minority matters and urged repeal.

C-44. Warner and MCA also claim that syndicated programs are of no significance whatever in this connection, being generally game shows without relevance to social issues (and never having a Black or woman emcee, or likely to), or foreign product similarly devoid of relevance to U.S. issues and problems. As to the two syndicated programs mentioned by the groups -- Black Conflict and La Raza -- Warner states that the former was produced for only 13 episodes in 1972-73, running on numerous stations but in access time on only one top-50-market affiliate (Philadelphia); it was terminated when advertisers lost interest after ratings were low. La Raza is claimed to be not a product of the rule but of McGraw-Hill's commitments in acquiring the Denver station; it has not been shown on any other station subject to the rule. By contrast, it is claimed, much network programming involves minority actors in leading or supporting roles, 33/ presents relevant material in public affairs programs (which have declined as a result of the rule), and frequently presents such outstanding features on minority matters as the Autobiography of Miss Jane Pittman.

33/ In 1973 comments, Warner and other majors listed 15 then-current network prime time half-hours as programming with a minority-member lead, and another 17 half-hours as having minority members in regular supporting roles. Warner also cites a Wall Street Journal article (November 1972) as setting forth a station view that "all-Negro shows have failed miserably" in access time.

E. Advertising Opportunity and Commercial Level under the Rule

C-45. The Court in its June 1974 decision thought public groups, such as consumer groups, might have significant views on the level of commercial activity in access time under the rule, noting the arguments of opponents that it is higher than with network programs, and the arguments of proponents that the rule affords a valuable opportunity for non-network advertisers. The two subjects, both raised in the earlier stages of the proceeding, were treated together in the conclusions of the January 1974 Report and Order, par. 100; it was concluded that they just about balanced each other out as to the merits of the rule. NAITPD claims now that this treatment was improper; the greater opportunity for non-network advertisers is a very important consideration and capable of achievement only through the freeing of prime time from network programs, whereas commercial level is a matter the Commission may deal with, if it believes it necessary, in a number of other ways -- rule making, a policy statement, or in connection with licensing or renewal. NAITPD calls attention to Congressional statements as to the importance of such increased opportunity, and also to the potential of advertiser-marketed access-period programs (via the barter route). It also cites FCC 1972 and 1973 financial figures, showing only a relatively small increase in network and national (and regional) spot advertising, but a greater increase in local advertising. As to the other side of the coin -- increased level of commercials -- it claims this is simply a matter foreign to this proceeding, for the above reason; and, in any event, the reduction in cleared time under the January 1974 modifications was simply counterproductive. With demand the same, and less cleared time, there will simply be even greater commercial activity in the time remaining.

C-46. As noted above, some of the public groups, whose views on this subject were particularly sought, attached weight to the increased opportunity aspect, but aside from Consumers Union, little or none to the matter of increased commercialization. Among the other proponents of the rule, Station Representatives Association (SRA) and Sandy Frank are the only other parties discussing this subject; SRA emphasizes the importance of the increased advertising opportunity, as mentioned above, not dealing with the other aspect of the matter. Frank discusses both, hoping that public groups, to whom the question is primarily addressed, will recognize that the two considerations do pretty much balance out, and that an increased level of commercial activity is not too high a price to pay for the advantages brought by the original rule -- increased advertising opportunity, programming from more diverse sources, and less network dominance. Frank also points out that the commercial level is still less than that at other times of the day, and that network daytime game show programs have just as many plugs .

C-47. Among the opponents of the rule, only Warner Brothers and MCA discuss this point, making the same arguments as before concerning the undesirable commercial level in access-period programs, up to six commercial minutes compared to three in network programs, plus numerous product plugs in game shows. This is said to be one of many undesirable consequences of the rule from the public's standpoint.

III. Arguments of Private Parties Generally

A. Outline of Arguments by Opponents of the rule.

C-48. The following introduction to the Comments of Warner Brothers et al summarizes the case against the rule (footnote references to the Commission's Court brief and the Pearce Report omitted):

> PTAR has admittedly frustrated its twin public-interest goals by decreasing program diversity and increasing network dominance. The Commission itself acknowledges that PTAR has created 'the present reality of a deteriorating diversity in programming.' And its Economist has found that 'overall network power has been strengthened, not weakened, by the prime-time access rule.
>
> In addition, PTAR produced other injurious side-effects. It has led to a doubling of commercials and an increase in 'hidden plugs' in the early evening children's hour; to an under-representation of women and minority groups in both program content and employment; to artificial discrimination against domestic programs in favor of foreign shows; and to unemployment in the American production industry and a stifling of American creative talent.

First Amendment considerations are also urged, as well as the asserted impossibility of the rule's resulting in anything beyond what has evolved so far. Most of these subjects have been discussed; the remaining ones -- program diversity and foreign programming, First Amendment considerations and the future prospects under the rule -- are discussed below.

B. Outline of Arguments by Proponents of the Rule. 34/

C-49. The comments of private-party supporters of the rule, particularly the very long filings by MAFPD and Sandy Frank, advance a wide range of arguments in support of PTAR I and against any modification of it which would reduce the 21 hours a week per market of 'cleared' access time. These, which in substantial part repeat points urged earlier in this proceeding, may be summarized rather briefly as follows:

34/ Not all of the proponents make all of these arguments, e.g., ABC not urging the "network dominance" point. This summary represents a composite of the views expressed.

(a) The objectives of the rule and the continu[ing] f[or] the full PTAR. The [rule] was adopted to: (1) increase the high c[ost] to [network] to greater [diversity], thereby [increasing] chance to [obtain] treasures for the public [from] [their] [talents], and (2) to stif[le] [excessive] independent production of network programming [and] alternative [sources], thereby giving the [networks] "the widest opportunity for the competitive development of new and diverse program sources." It was not stated that [the] quality, and quantity of programs and program ideas was an ultimate hope rather than a paramount objective. There is no reason [for] any relaxation, because the problems are still the same, i.e., [due] to network dominance, at least as great now as before. (See, [for] [example], [the] [hours] used by ABC and NBC and the extent to which the [networks] moved to occupy the time given them by the January 1974 decision). The Commission found one hour of "clearance" time essential to the development of a viable alternate, independent source of programs, and there is no basis for altering this conclusion, since in the absence of a fair test of the rule there is no empirical evidence, and no economic analysis has been made. Therefore, the original objectives are still of paramount importance, and the only modifications appropriate for consideration are those which would further these, not ones like PTAR II which would frustrate them. Any other Commission objectives must be pursued by other means consistent with these objectives.

(b) The rule has not had a full and fair test; certainty is vital to proper development under it. It is clear that the rule has not had a fair test, certainly as to the kind of programming which can result, because of the uncertainty surrounding its future and its administration, e.g., the postponement of the off-network restrictions for a year, waivers early in 1971 to ABC and NBC to run 3-1/2 hours on certain nights of the week, off-network and other waivers starting early in 1972, and the Commission's beginning this proceeding, to consider relaxation or repeal, less than a month after the rule finally went into full effect in October 1972. 35/ Under these conditions, commitments for expensive and diverse programming are difficult or impossible to make, and any look at the rule's performance, particularly in this respect, is premature; modifications such as those of PTAR II represent a hasty reversal of a decision carefully reached after long and intensive deliberation. In order to give needed certainty, the Commission must commit itself to retain the rule for a period such as 5 years; Westinghouse states that if the Commission is not prepared to do this it should look toward ultimate repeal, retaining PTAR I until other means of dealing with network dominance can be explored and put into effect. Viacom apparently regards this commitment as necessary [to] than the details of the rule to be adopted.

35/ Warner in reply comments disputes this uncertainty argument, claiming that the 1971-72 year was indicative because the absence of off-network restrictions did not have much effect, and many non-network shows still [were] used; 1972-73 was not really a year of uncertainty since programming [decisions had] been made before the Commission's October 1972 Notice herein.

(c) The rule has worked in light of its objectives, with network control over station time obviously lessened, a large number of access-period programs and producers (and also important distribution entities such as Viacom, Worldvision and Jim Victory), benefits to independents and no harm to affiliates even in small markets, and increasing independence among affiliates as shown by the substantial number of preemptions. (See pars C-22-23 and C-28-29). It is asserted that the claimed deficiencies in the rule's performance and effects are not the result of the rule but of either the networks or stations (reduction in regular network public affairs, the late hour of network children's programs, station reliance on stripped programs or overuse of some programs) and, to the extent they are a valid concern, should be approached by other means.

(d) The PTAR II modifications were unjustified and highly injurious to the rule's operation and objectives, amounting to a totally unwarranted reduction in "cleared" time of nearly two-thirds 36/, and greatly crippling the opportunity for new material and increasing the network "presence" without any reason whatsoever. Assertedly, the result was the cancellation or termination of numerous programs planned for 1974-75 (the Court's reversal came too late for most of these to resume production). The Ozzie's Girls series, fairly successful in 1973-74, is given as an example, along with a number of other programs (none of them game shows) which had been specifically planned and (in one case at least) the subject of a large sum on development. It is said that therefore 1974-75 is meaningless as an indication of the rule's potential. It is also claimed that the decision was counterproductive in terms of the Commission's objectives, for example returning Sundays, and to a large extent in practice Saturdays, to the networks would have wiped out the time slots of 5 or 6 local programs in Washington, D.C. alone, in return for some network situation comedies and a network public affairs program lacking particular local significance. It is said that any incursion into weekend time is particularly bad in this connection. It is also urged that the removal of all restrictions from the first half-hour of access time assures that nothing besides news, game shows and off-network programs will ever be shown then (since nothing else could stand the combined competition); and the exemption for network programs of certain types -- children's specials, public affairs and documentaries -- means that no programming of these types from other sources will ever develop, particularly bad when there will be only three "voices" heard in non-entertainment programming. NAITPD also urges that stations need time for syndicated entertainment programs in order to gain revenue to support substantial local programming efforts, and that any reduction in this time increases competitive pressure and the likelihood that a locally significant program (e.g., one of concern to minorities) will be cancelled.

36/ Numerically, the decision reduced cleared time from 42 to somewhere between 15 and 18 half-hours per week per station. We pointed out in the January decision that the first half-hour Monday-Friday is largely useless from the standpoint of opportunity for new material, since 90% of stations subject to the rule use it for either news or stripped game shows most of which existed before the rule; on this basis the starting point would be not 42 but 27 half-hours. The Court in its decision assumed the 42-15 analysis of the rule's proponents.

(e) Other advantages flowing from the rule. NAITPD et al. urge that a number of other advantages flow from the rule and are reduced or jeopardized by PTAR II or similar modifications, including:

(1) Presentation of programs of less than national appeal, aimed at key markets or certain demographic groups, which the networks almost by definition will not present. NAITPD cites Walk and Hee Haw as examples, and also notes differences in the access programming shown in different markets.

(2) Freeing the entire program process from so much domination by three sets of managers, which is frustrated by any action letting off-network programs back in or (of particular importance) letting the networks present documentaries and public affairs programs in access time. It is also claimed that, with respect to syndicated as well as local programs, the independent program production process involves more programming of significance to, or involving or reflecting the influence of, minority groups, women, etc., since the network process is largely "white middle-aged male" as far as major studios, unions and networks are concerned. Development of minority-group talent (e.g., George Kirby) and programs such as Black Omnibus is mentioned.

(3) An increased supply of programs for independent, as well as affiliated, stations. It is claimed that independents will soon need these even though they are not now large customers, since the supply of off-network programs is diminishing (for a number of reasons) and they are beginning to lose their rating "edge" over access programs on affiliated stations.

(4) Benefits, attributable to the rule, to UHF stations, to national advertisers, and in the financing of independent producers in their network efforts by syndicators who have done well with access programs such as Worldvision. See pars. C-22 and C-28 - 29, above.

(f) "Diversity" and "program quality" are no basis for modification of the rule. The extensive arguments on this score, by proponents as well as opponents, are discussed below (pars.C-54 - 60).

(g) First Amendment arguments. The arguments -- chiefly by NAITPD -- that the January 1974 modifications as well as "off-network" waivers violate the First Amendment, are discussed below, along with arguments in this area of Warner Brothers and other opponents.

(h) The modifications impair the whole regulatory structure designed to deal with network dominance and encourage independent programming. This argument, by NAITPD and Frank, relates to the fact that the prime time access rule, the syndication and financial interest rules were adopted as a package in 1970, designed to deal with the problem of network dominance. It is claimed that the January 1974 modifications do violence to the whole package. Frank states that "to remove or substantially weaken any one of these several regulatory arches would greatly weaken the ability of the structure they support to bridge the gap between a free competitive market and the oligopolistic controls in prime time television". Frank adds, more generally,

that the Commission, if it seriously intends to further the development of an adequate independent TV program market, cannot do so "on the cheap", and should should quit trying to compromise and be all things to all segments of the industry.

C-50. Other points in proponents' comments. ABC asserts that its increased profitability as a result of the rule has enabled it to increase public-service programming on the network (citing the Reasoner Report, monthly "Close-up" documentaries, the bi-weekly After-School Special, and other examples) as well as to increase local programming on ABC-owned stations. Time-Life asserts the need for opportunity to distribute its "quality" material, which adds quality and diversity to the access period -- Wild, Wild World of Animals, Other People, Other Places, Family Classics, War and Peace, America, etc. (a number of these are off-foreign network, and America is off-U.S.- network). Leake TV and Wometco urge retention of the rule to continue their local programming efforts, Leake TV for hour-long evening newscasts on weekdays (although it does not appear that these would be impeded by the modified rule), and Wometco for two regular local series on WTVJ, Miami -- Montage, a weekend public affairs magazine program, and Great Adventure (travel-adventure), a locally produced program which has been successful and is now syndicated to seven other stations. The former, costing some $138,000 for 44 programs, is the highest-rated regular public affairs program in the market and one of the highest-rated access shows. It is stated that, while this program might be carried without the rule, it might have to be given up, because of network pressure to clear or harm to the station's image if CBS puts its program on another station as a result of WTVJ non-clearance. In short, it probably would not be carried as often or with as much commitment. As to the second program, which costs $154,000 a year, it is stated that the rule modifications present problems for this hour-long show. It is urged that the program has added to the syndication pool, and this shows what a local station can do in a market like Miami. Post-Newsweek asserts the importance of the rule in connection with continuation of its local programming efforts -- 3 or 4 in prime time in Washington, the same in Miami, 3 in Jacksonville and two in Hartford.

C. "Diversity" and other Programming Considerations

C-51. Arguments of the opponents. This is one of the chief matters urged by the majors and other proponents of the rule -- the asserted lack of diversity and quality in access-period programming compared to network programs, most of all the emphasis on game shows, which, according to the majors' "Joint Appendix", occupy 890 hours out of 2,100 total access half hours on 159 stations (of which 1,341 are devoted to syndicated entertainment).37/

37/ Proponents of the rule claim that this "Joint Appendix" is of no probative value because the underlying data is not given. However, a staff analysis of 1974-75 programming, the results of which are set forth in Appendix D hereto, indicates that it is sufficiently accurate for certain purposes.

This is 41.9% of the 2,100 access half-hours on 150 stations, or 65.6% of the 1,341 of these half-hours devoted to syndicated entertainment programming (total less news, other local and movies). The latter percentage represents a dramatic increase over pre-rule conditions (11.1% in 1970-71), and a continuing increase each year under the rule (54.8% in 1973-74). Some other types of access-period syndicated programming have decreased accordingly, drama from 46.3% in 1970 to 4.9% in 1974 (66 half-hours) comedy from 21.7% in 1970 to 0.4% in 1974 (6 half-hours) 39/ It is also noted that there is a high concentration of game shows Monday-Friday on affiliated stations in certain markets -- three stripped game shows at the same time in Cincinnati and two other markets, two strips in one half-hour and two strips plus a block of 5 game shows in the second half-hour in one (Albany), two strips followed by one strip and one block of game shows in two other markets, and strips or blocks of game shows at the same time on 2 stations in 20 other markets. 39/ Seven of the game shows are additional 6th or 7th episodes of stripped network daytime programs, compared to three in 1973-74; Warner claims that these occupy 25% of access entertainment time. 40/

C-52. The majors' joint appendix compares the 23 leading access programs (in terms of time on the 150 stations devoted to them) with 24 network shows adjacent to access time as of September 1974 (8 p.m. Monday-Saturday and both the first and last network programs on Sunday), inviting the reader to make his own comparison as to quality and diversity. The access programs include 15 game shows (5 of them generally stripped), 3 animal shows (at least one of them foreign and one, Wild Kingdom, the subject waiver of the rule), musical variety shows Welk and Hee Haw, one foreign-produced dramatic program (Police Surgeon), one foreign-produced documentary (World at War), and Candid Camera. The adjacent network shows include six comedy (All in the Family, Odd Couple, Happy Days, Good Times, That's My Mama and Sanford & Son, the latter three involving largely Black characters); one comedy-variety (Sonny); 5 crime-drama, one medical and one Western; (NBC Mystery Movie, Mannix, Kodiak, Adam 12, The Rookies, Emergency and Gunsmoke); 7 other dramatic programs (Apple's Way, Little House on the Prairie, Sons and Daughters, Waltons, New Land, Sierra and Born Free); one science fiction

38/ Two other categories show substantial amounts of access time, variety (161 half hours) and nature-travel (150 half-hours), respectively 12.0 and 11.2% of access entertainment time. The respective percentages were 17.2% and 2.3% in 1970 (nature-travel has increased steadily; variety was higher in earlier years under the rule).

39/ As shown in Appendix C, there is a much higher concentration of game shows on weekdays than on Saturday or Sunday.

40/ NAITPD points out that 3 of these 7 programs were originally sold in syndication as single-episode programs before being picked up by the networks, and another (Let's Make a Deal) was originally a prime-time network program.

(Planet of the Apes); and the ABC Movie and Disney. NAITPD claims that this is not a valid comparison, since the time period is different; a better one would be with some rather undistinguished network shows at 7:30 in earlier years. 41/

C-53. The majors also advance certain other points: (1) critical opinion has almost unanimously condemned access period programming (numerous articles from Time, New York Times, Washington Post, Wall Street Journal, TV Guide, etc. are quoted); (2) the disappearance of regular network public affairs programming from prime time, whereas in 1970-71 CBS and NBC both had one-hour shows; (4) the use of foreign-produced material, generally off-foreign-network, although the majors note that this has declined from earlier years under the rule, since, assertedly, even it cannot withstand the "game-show onslaught" (the appendix shows off-foreign network material as occupying 7.2% of access entertainment half-hours this year, compared to 17.6 and 14.3% in the previous two years); (5) the argument that only the networks have the resources and the fortitude to come up with really new programming; (6) a statement by one of the more successful game-show producers (Chuck Barris) admitting that game shows largely appeal to the greed of the viewers, and noting that he has been called "the King of Slob Culture." (TV Guide, August 10, 1974). 42/

C-54. Arguments of proponents of the rule. NAITPD, Frank and other proponents urge that concepts of "diversity" or "quality" are simply inconceivable as a valid basis for modifying the rule. NAITPD claims that to do so violates both the First Amendment and the Communications Act, in making the Commission a censor, encouraging or discouraging programs according to its own ideas of their value. Frank does not go this far but claims that, at most, this could only be done after the Commission had formulated standards in this area (after a public proceeding),

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41/ It is also to be noted that: (1) 7 of the 24 network shows will terminate in January 1975; (2) 13 of the 24 programs are one hour (all but three drama and six comedy), whereas only 3 of the access programs are one hour; and (3) to the extent that the analysis includes the late Sunday evening network shows (two crime-dramas and the ABC movie) it should also include access dramatic programs such as The Protectors much shown at that time) and also considerable local programming.

42/ The majors also repeat their earlier claim that the rule results in very little programming not previously or otherwise available, asserting that the great bulk of it is either retreads of former network shows, extensions of present daytime network shows, off-foreign-network material, or material previously in syndication; it is stated that only 5.7% of access time is occupied by programs available "because of" the rule. The programs are not identified; apparently they include some new game shows and one animal show. A similar CBS analysis, of 28 programs listed in a mid-1974 survey as sold in 10 or more markets for access use this fall, claims that 6 are additional episodes of daytime game shows, 10 are continuations of former network series, two are off-foreign network, and 10 are new syndicated material (though 2 of these are foreign and 5 animal shows use largely foreign-shot footage). The 3 entirely new U.S. shows are said to be Jimmy Dean and Bobby Goldsboro (musical variety) and Wait Til Your Father Gets Home, animated comedy.

which would have to take into account a wide range of other matters such as the characteristics of network prime time (reruns, movies, the number of shows of a given type such as "cop shows", etc.) as well as changes in taste from time to time -- something the Commission has in the past refused to do. NAITPD and Frank also urge that, where entertainment material is concerned (i.e., where the station's public service responsibilities are not involved), program choice is of no concern to the Commission as long as it is reasonably acceptable to the audience -- the public interest is what interests the public -- and should be left to the market place and station decisions. The Commission should adhere to its statement in the 1970 decision that it would not attempt to determine the types and cost levels of the new programming for cleared prime time. NAITPD claims that there is no reason or basis for "a comparison of escapist entertainment programming", and that access game shows really perform the same function as typical "gloss and schmaltz" network commercial material -- providing economic support in both cases for material of greater significance, local programming efforts by stations in the first case and documentaries and public affairs programs by the networks in the other. It is also claimed that any such consideration is a wrong emphasis on programs rather than sources, and that deficiencies in this respect are not chargeable to the rule but to decisions by stations and networks, in not buying different programs or in network scheduling (for example, they could run children's programming at 7:30 if they chose to relinquish a later half-hour). These matters can be dealt with, to the extent they are legitimate concern, by other means. Frank claims that this is a criticism which can be laid to almost anybody of programming by those wishing to do so -- e.g., the bland commercialized network programs of the 1960's replacing the dramatic programs of the 1950's, or years when Westerns were shown in extensive numbers.

C-55. It is also claimed that there is considerable diversity in access-period programs, with a rather wide range of material; NAITPD calls attention in this respect to assertedly innovative access programs like Story Theatre (which lasted one year) and local programs in Boston and Columbus, and also claims that there are advantages in having creative persons not subject to network control (citing a TV Guide article of August 3, 1974, containing an interview with TV writers). It is asserted that there would have been more access-period diversity except for the uncertainty as to the rule (see par.C-49,above) which made it unattractive to produce or buy any but the cheapest and most obviously saleable material. NAITPD refers to program plans assertedly cancelled after the Commission's January 1974 decision, including three comedy series, a family drama series and two variety shows, plus children's and talk shows. It is said (quoting Congressman Celler) to be preposterous to assume that, given reasonable certainty as to conditions, the marketplace will not produce all types of programs for which there is station demand. It is also urged that the lack of diversity results from the time period, 7-8 p.m. E.T., which is one of mixed audience (the presence of children limits sophisticated material) and divided activities, which works against dramatic shows with a story line and in favor of game and animal shows.

C-56. As to game shows in particular, these are said to be pleasant entertainment well suited to this time period, much used on CBS and other network-owned stations, highly popular (sometimes outdrawing network programs, e.g., I've Got a Secret currently in New York City at 7:30 p.m. Sundays), requiring considerable skill to be produced effectively, by no means cheap (Frank states that one of his programs costs around $50,000 an episode to produce, and NAITPD gives some high price figures for station purchases, higher than non-game material) and, in short, certainly not to be censured if this is what stations choose to do. Frank claims that the term is misleading if used to lump all of these programs together; actually, there are four distinct types: (1) game, which may or not employ celebrities in addition to ordinary people, and which is a genuine contest with emphasis on the game (e.g., Hollywood Squares); (2) panel, such as To Tell the Truth, with the ordinary citizen participating more or less as a foil for the celebrity panel, and the emphasis is on comedy; (3) audience participation, such as Truth or Consequences, involving ordinary people generally and with emphasis on fun, and (4) Giveaway -- The Price is Right, etc. -- where the emphasis is on the prizes. Thus, the term "game show" covers several types of programs, just as "action-adventure" covers several types of network programs (crime drama, Westerns, and other types). It is also claimed that these shows have merit in not involving social damage such as the continued effect of violent network shows in increasing violent behavior. 43/ Frank claims that game shows are likely, to some extent, a passing phenomenon, just as Westerns were in earlier years on network television, and will decline in number with time; Westinghouse predicts that, in view of their suitability for this time period and popularity as light entertainment, in all probability some of them would be included in network schedules if they regained access time (just as they were in the past and are in daytime network schedules). NAITPD makes similar observations about stripped programming -- this represents an appropriate licensee decision if it chooses to take this course, but use of stripped material may well be declining or about to.

C-57. It is also urged that current and past network programming is not much different in this respect; Westinghouse, for example, breaks down current network prime time schedules into various categories and shows 40 half-hours a week (41.2% of the 97 half-hours which are not feature films) as being "police, private detective, crime and mystery" (followed by other drama, 22 half-hours, and situation comedy with 15 half-hours). The near-absence of variety programs, particularly musical variety, is noted, and it is claimed that original drama has long since disappeared. It is urged that the networks are gradually

43/ With respect to the statement by Chm. [illegible] (par. C-56, above), Mr. Barrie submits an explanation and disavowal of the statement, claiming that game shows are a pleasant and entertaining diversion, innocent and without danger compared to some violent network programs.

imitative of each other, and that, here as everywhere in television, there is and will be extensive "derivation" of one program from another -- All in the Family to Maude to Good Times, Mary Tyler Moore to Rhoda, etc. -- and it is also noted that critical opinion as to network programs, in particular and generally, is often sharply adverse. Sandy Frank points to a number of particular examples of lack of diversity in network programming, such as three crime-drama shows opposite each other Wednesdays at 10 p.m., and CBS on Saturdays with four sitcoms and one variety show, and on Wednesdays with one dramatic program and two crime dramas. It is pointed out that when these occur they affect the entire country, not just a few individual markets such as those pointed to by Warner as examples of game-show concentration.

C-58. It is claimed that the PTAR II modifications, as well as waivers, have been and will be counterproductive with respect to achieving diversity. NAITPD claims that this is true with respect to the Sunday and (in practice) Saturday changes, which would end the chances of one-hour access period programs (Lawrence Welk and Hee Haw and other potential programs which need this longer period), and also presentation of local programs. It is said to be true of the removal of restrictions from the first half-hour as well; by adding off-network programs to the permissible mix at that time (which themselves add nothing to diversity), the Commission has guaranteed that no other type of new material besides game shows will ever be shown then (since only game shows can compete with off-network), and has raised the likelihood that stripped game shows will also dominate the 7:30-8 periods. The exemption for certain particular kinds of network or off-network programs (documentary, public affairs and children's specials) means that there will be only three sources of such material. The "tie" of access time to 7:30 means an end to any weekday one-hour possibilities and also means that the same audience and thus basically the same programming will be involved in the access period at all times. Waivers are said to have the same effect; the waivers for off-network "animal" programs (when there are already several available without waiver) means more of such material to the exclusion of other types, discourages production of all-new material, and conflicts with the statement in the 1970 decision that the Commisson was not "smoothing the path" for syndicators.

C-59. It is claimed that there are other ways by which this problem can be dealt with without sacrificing any of the rule's important objectives. Matters such as non-presentation of local programming can be dealt with in setting license renewal standards, and the same kind of approach could be used against stripping. NAITPD also suggests that a relatively small change in access time would help considerably -- requiring clearance of an hour from 7:30 to 8:30 on one wekday (with a give-back on another day), which would never be game shows and would prevent stripping. Viacom suggests a more elaborate arrangement to put part of access time later in the evening, such as 10:30 instead of 7:30 on three specified weekdays; Frank suggests "clearing" 9-9:30 instead of 7:30-8. More important than these, it is said, is certainty --

the knowledge of producers, distributors and stations that the rule will remain fixed for an extended period (such as 5 years), and without waivers. Thus, there will be incentive to invest in material other than which is cheapest and most obviously saleable. Given this, diversity will, and should be left to, come from the operation of the marketplace.

C-60. Foreign programs. One of the chief objections to the rule by its opponents is the extensive use of foreign material, most of it off-foreign network and thus for sale with its costs already recovered or largely so. Frank claims that this is not a significant matter; there are only 6 of these this year, none of them game shows, and they add diversity. It appears from the various lists of programs submitted by parties that the number is somewhat larger than this, although an exact answer is difficult to determine because most animal shows consist at least in part of footage shot outside the U.S., and some other programs are produced abroad but by U.S. producers. See Appendix D.

D. Prospects for Future Programming under the Rule

C-61. The opponents of the rule, including Warner, MCA and others, argue that the programming under the rule will never be different or better than it is now; because of the limited economic base for syndicated programming and the "game-show onslaught", the latter being much cheaper to produce (often on a mass-production basis with several shows in the same series shot the same day (MCA claims that 80% of studio costs can thus be saved). Therefore the syndication market will never support expensive, quality material such as drama or comedy, which costs $100,000 or more per episode; achieving network-quality programs outside the network structure is not possible. There is reference to the statements of a 20th Century-Fox executive at the 1973 oral argument, that a U.S.-produced program in the $100,000 range is simply out of the question; the company has been able to participate in access programming by foreign production (plus one game show) and getting an O&O group deal. The numerous failures are noted, including those from prominent entities in the industry, such as numerous Westinghouse programs and Metromedia's Primus in 1971-72, Dr. Kildare the next year, and Dusty's Trail and Ozzie's Girls (two programs mentioned in the January 1974 decision as affording hope for the future) in 1973-74. 44/ A total of 48 syndicated programs have been produced for access time and then have failed, only 7 of them game shows. Newhouse Broadcasting Corp., one of the licensees opposing the rule, claims that the present tight economic situation and scarce capital compound the problem; the networks alone have the resources and broad base to undertake "real" programs.

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44 / Viacom, which co-produced and distributed the Ozzie's Girls program, claims that it was reasonably successful in 1973-74, appearing on more than 83 stations reaching 74% of the nation's TV homes; but after the reduction in time adopted in the Commission's January 1974 decision, Viacom could not get enough station commitments to continue production.

C-62. Proponents of the rule, such as NAITPD and Sandy Frank, contend that this is not the case; the problem has been one of uncertainty, and with a reasonable assurance that the rule will continue in its original form for a substantial period, more ambitious programming efforts will be undertaken. NAITPD refers to various programs which its members had planned for this year (sometimes with extensive financial commitments) but which were cancelled after the January decision (see par. C-55 above, as illustrative of what is likely. Frank points out that many of the producers of access-period material have been successful as producers for networks in the past (and some are today), so that there is no shortage of competence in the access-period producer group. NAITPD advances points of an economic nature: a successful access show can count on revenues of at least $3 million annually, which is $100,000 per episode assuring a 30-episode series, or $125,000 with a 24-episode series, and this compares favorably with the production cost figures for half-hour shows in the fall 1974 network schedules as given in Variety, September 18, 1974. 45/ Of the latter, the most expensive is NBC's Adam 12, $125,000 per episode, and the least expensive is NBC's highly successful Chico and the Man, $90,000; the average for the group is $105,529, and the median $105,000. NAITPD also claims that this kind of analysis should not focus on cost; the important thing is prices which stations will pay for programs, and these are high and increasing, for example NAITPD member's program sold for $3,850 per episode in 1971-72 in New York City, and $11,200 in 1973-74, $1,000 and $3,000 in Boston in the same years, etc. (in smaller markets the increase was generally less percentage-wise). The availability and widespread use of the barter mechanism, under which a sponsoring advertiser (Colgate, Bristol-Myers, etc.) buys the program or pays for its production, and makes it available to stations at no monetary cost to them but reserving a certain number of commercial positions in the program for the advertiser, is noted

45/ This analysis does not take into account the cost of distribution, which often is 30% or more of gross. This would reduce $3 million in gross revenue to some $2.1 million, or slightly under $90,000 per episode for 24 episodes.

C-63. Sandy Frank lists four program ideas which he has considered co-producing or financing, including a series about an Indian boy (Straight Arrow); a documentary series about great American rivers, their regions, people, music, etc.; a factual series dealing with how to live in spite of various current shortages ("Doing Without"); and a local news "library" program service for stations to use to enrich their news and weather programs. He also states that he is seriously considering two other series -- both beyond the "idea" stage -- one documentary concerning the contemporary scene, and another for children of all ages and including a great deal of educational and informative material. Whether these will be produced will depend on evolving economic factors, including a stable economic climate for access time; Frank is sure that others also are ready and able to participate in broadening access period programming. Westinghouse states that, although its interest in this matter is that of a licensee (it entered production in 1971 only because suitable new material from other sources was not available), and it does not anticipate a substantial increase in its production and syndication activity, it firmly believes such activities can be successful, and with assurance of stability and "Group W for one is prepared to produce and syndicate prime time programming nationally" (as stated in the 1973 oral argument). On the other hand, Warner and MCA assert, as they did before, that such statements by program suppliers cannot be relied on; several producers and syndicators supported the Commission's decision in 1970 with statements as to programs they intended to offer, but virtually nothing materialized from such parties.

E. "First Amendment" and Related Arguments.

C-64. The three comments from major film companies urge that the off-network and feature film restrictions of PTAR I and II are illegal as censorship and infringement of First Amendment rights, and the Motion Picture Association of America (MPAA) urges the same point as to the feature film restriction. Warner extends these concepts to the whole rule. Warner, and to some extent MCA, Columbia, and MPAA urge the following points:

(a) The rule is unconstitutional in effect because of the decreased and deteriorating diversity of programming which has resulted, which frustrates the Amendment's guarantee of "the widest choice of programs and ideas". The rule has a forbidden "chilling effect" on the economic structure of access-period programs, resulting only in game shows. These public rights to diversity of programming cannot be abridged on the basis of speculation that better things may come, particularly in view of past producer records of not carrying out promises (see paragraph 79, above). Cited in support of these contentions are the Mount Mansfield decision affirming the rule, supra, and Associated Press v. U.S., 326 U.S. 1 (1945), Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), and Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).

(b) The PTAR II total ban on use of feature films during the access period-which, assertedly, virtually precludes their use during prime time at all (see paragraph C-66), is "a total ban of an entire class of protected speech... a wholly unprecedented form of direct censorship of program content.", barring this form of speech in favor of some preferred types of material. It is claimed that any rule which bars or restricts 1776, Patton, Sounder, or The Autobiography of Miss Jane Pittman, while encouraging Bowling for Dollars, "defies any conceivable public-interest or constitutional rationale." The same is said to be true of the off-network restriction, encouraging the latter program, and generally replications of the cheapest network game shows or additional episodes of present daytime network shows, while barring Lassie, and similar material, even though independent in origin. MCA notes in this connection that the 1971 affirmance in Mount Mansfield was in part on the basis of the experimental nature of the rule, which could be reviewed de novo in light of experience (442 F.2d 479); also cited in this connection are Rendell v. FCC, 405 F.2d 1082 (U.S.C.A.D.C. 1968) and Branch Line Maine Line Radio, Inc. v. FCC, 473 F.2d 16 (U.S.C.A.D.C. 1972). MPAA takes the same arguments as to the feature film ban adopted in PTAR II, also asserting that: (1) Mount Mansfield did not deal with this total ban, since the rule as considered by the Court in 1971 did not contain it, and (2) this particular total restriction is indefensible because it

does not have the justification of limiting network control. 46/

(c) The PTAR II modifications are just as invalid from this standpoint as the original rule in setting up categories of preferred programs-children's, public affairs and documentaries-while barring others. It is claimed that this " places the Commission squarely in the programming business in an unprecedented and intolerable manner", involving subjective judgements either with respect to waiver or, under the PTAR II modifications, with respect to interpretations and definitions as to whether particular programs fall within these categories. The only way to avoid these problems is to get rid of the rule. CBS also urges this point.

(d) In so far as the rule may be defended because of its encouragement of local programs (minority-interest and others), it is constitutionally invalid as an over-broad restraint on program choice and diversity for many, for the benefit of a few. Shelton v. Tucker, 364 U.S. 479, 488 (1960), NAACP v. Alabama, 377 U.S. 288, 307 (1964) and other cases are cited in support of this contention. It is claimed that if the Commission wishes to approach this objective, it must do so directly, by renewal examination or a policy requiring local originations, not by this rule with its unconstitutional restraint otherwise.

C-65. The First Amendment case of the proponents against the kind of modification adopted in PTAR II, is largely contained in the appeal brief of MAFPD, partly incorporated in the comments herein. These turn largely around the preferred program categories mentioned above in connection with the argument of the opponents of the rule (although MAFPD's arguments run to some extent against any modification which would reduce the amount of time cleared of network and off-network material). It is claimed that under the PTAR II modifications, the network "funnel" becomes the Commission's "sieve", through which may pass those programs the Commission approves of, and others are excluded. The rather elaborate contentions are discussed, to the extent necessary, in the Conclusions herein.

46/ MPAA also claims that administrative convenience adoption of the total ban in order to avoid making troublesome distinctions between various categories of movies-is not a valid basis for such a restriction; and that the possibility of use in other than access time is no justification either. In sum, whereas the original restriction at least was an effort to tailor the restriction to the problem this is an over-broad blunderbuss approach. [illegible], 373 U.S. 184, 187-88 (1963), Miller v. California, 413 U.S. 15, 23 (1973), [illegible], 12 200-ft. Reels of Film, 413 U.S. 123, 127 (1973), [illegible], 357 U.S. 513, 525 (1958) and [illegible], 303 U.S. 147, 153 (1939) are cited in support of these arguments.

F. The Off-Network and Feature Film Restrictions.

C-66. Because extensive use of off-network material in cleared time would "destroy the essential purpose of the rule to open the market to first run syndicated material", the rule as originally adopted in the May 1970 decision barred from the one cleared hour "off-network syndicated series programs". Since the objectives of the rule would similarly be frustrated if affiliates adopted a general practice of substituting feature films for network fare, the rule also similarly barred "feature films previously broadcast in the market." See 23 FCC 2d 382, 395, 402. On reconsideration in August 1970, the language of the "off-network" restriction was changed to read simply "off-network programs"; and the feature film provision was modified (on the basis of arguments that it is difficult to tell whether a movie may have been shown in the market in the distant past) to read "feature films which within two years prior to the date of broadcast have been previously broadcast by a station in the market. "(Section 73.658 (k) (3). See 25 FCC 2d 318, 334, 337. The revised language of the two provisions left, or appeared to leave, doubt as to how the rule applies to movies previously shown on a network; if they were off-network programs , they are barred permanently, but if they were feature films , they are barred only for two years after a previous showing in the market. Accordingly, in November 1972 (FCC 72-1052), the Commission issued a public notice to the effect that, pending consideration in the general Docket 19622 rule making, the Commission would not take action against licensees who construe the rule as meaning that movies previously shown on a network may be shown again after two years. The January 1974 decision generally retained the off-network restriction and adopted a total ban on use of feature film of any kind during the six cleared half-hour periods each week provided therein, in order to avoid incursion into the amount of cleared time which was reduced by that decision in other respects. See 44 FCC 2d 1031, 1135-36. This was affirmed on reconsideration of that decision in April 1974; 46 FCC 2d 1013, 1014-1017.

C-67. Two of the comments of major film producers (Warner et al., and Columbia) as well as NCITP, urge that these restrictions should be repealed even if the rule generally is retained. Aside from the constitutional arguments already mentioned, it is asserted that the restriction on off-network programming cuts down diversity and thus harms the public, as well as leading to some highly anomalous and unfortunate results (see paragraph C-64, above). The other argument is the alleged injury to the majors, and other producers for networks, who badly need this "after market" in order to recover the costs and possibly show a profit on their network production efforts. See paragraphs C-37 - C-38, above.

C-68. The three complaints from the majors, plus the Authors League and WGAA, urge repeal of the total feature film ban of 8:30 P.M. Aside from constitutional arguments discussed above, it is claimed that the rule is definitely anti-competitive with respect to network dominated, since it forces [illegible] the most important elements in the industry and alternatives to the networks, those that the networks will be the only source of movies in prime time on television and will "stockpile" them for longer and longer periods, and thus hurts the quality and freshness of movies shown on stations at other times as well. In effect, it is said, this amounts to a ban on movies entirely between 8 and 11 P.M., since stations cannot run them in the early evening because of size, cannot run them during later prime time without preempting network programming already reduced in amount by the rule, and cannot run them in the middle because of the new ban on the 7:30-8 time slot. MPAA contends that the showing of syndicated movies declined 72% between 1969 and 1973, and the effect will be worse with the new ban. Viacom urges the impact on major film companies, with sales of theatrical films in syndication having fallen from $94 million to $43 million between 1970 and 1973; the loss of this market is a serious blow to those companies both as makers of new theatrical films and as suppliers of TV programs.

C-69. The proponents of the rule do not discuss these matters at great length (except to the extent they are treated in NAFMD's appeal brief, as discussed in the Conclusions herein). Sandy Frank, in replying to comments of the majors, states that the feature film ban should be retained. There is plenty of exposure of movies on TV otherwise (day-time, late night, preemptions by affiliates of network prime time programs for their own movies, independent stations both off the air and via cable, pay cable, etc.) so this additional time is not needed. It is claimed that use of theatrical features over-dominates all original television production, which the majors claim to be concerned about. As to the off-network restriction, Frank claims that the majors are not entitled to use access time as a dumping ground to recover the costs of their former network productions; they will simply have to negotiate better terms with the networks. It is also asserted that the majors are simply unrealistic for the best of all worlds--when they could have their new programs on network at 7:30, and their off-network programs on stations at 7 without restriction, in both cases being free from effective competition.

G. Arguments of Other Parties; Other Approaches to Network Regulation

C-70. The comments of three other private parties, not taking any basic position pro or con, should be noted. NBC in initial comments supports PTAR II, stating that the rule has irrevocably altered the industry and asking for an end to controversy. Much of its comments is devoted to an exposition of what the Commission should say in its decision to support it, including reference to the historic importance of, and benefits from, networking in the U.S. television picture. The essence of NBC's comments has been set forth in paragraph C-21 and elsewhere above. Bill Burrud Productions, Inc., producer of the Animal World series, states that the rule has been generally beneficial, but it is concerned about the influx of off-foreign-network programs, assertedly subverting the intent of the rule. American producers are restricted as to the access period, whereas foreign producers are not -- whereas American producers face import quotas and other obstacles in selling abroad. This discrimination is claimed to be neither fair nor equitable, and clarification or definition is sought. The Wolper Organization, Inc. (Wolper) producer of numerous documentary and similar programs such as National Geographic, Appointment with Destiny, March of Time, etc., praises the Commission's January decision as making it easier to get this kind of independently produced "Educational Value" programming on the networks, since CBS informally agreed to take six National Geographic specials for 1974-75; but the Court's decision led to cancellation of these. Wolper argues that the Commission's decision is going to affect the kind and quality of access-period programs, and that his type of material will most readily gain exposure if the networks are either required or encouraged (by an exemption of the sort adopted in January) to present it. He asks further consideration of his original proposal to this effect.

C-71. Alternative approaches to network regulation. Warner Brothers, Screen Actors Guild and other opponents urge repeal of the rule and approaching the network dominance problem in other ways, and Westinghouse urges the Commission, if it does decide that the rule should be repealed ultimately, to retain it until other approaches are adopted and effective. The proposals are not very specific: SAG asks that the networks be prohibited from producing their own programs, and Warner suggests consideration of the alternatives recommended by former Chairman Burch in dissenting to the rule, by former Commissioner Johnson in partly dissenting to the 1972 Notice beginning the Docket 19622 proceeding, and those involved in the Department of Justice litigation. The Burch suggestions were to look toward other forms of television to supply added diversity -- subscription TV, cablecasting, and public television. The Johnson suggestions included realigning UHF stations into higher power regional outlets, with the possibility of attracting audiences to compete with network affiliates and the potential for interconnection into a new network; requiring the networks to open each network program for bidding by stations in the market on a per-program basis; requiring the networks to spread their prime time hours proportionately among all stations in a market; and other suggestions beyond the scope of the present proceeding or Docket 12782.

H. Effective Date of Rule Changes

C-72. The proponents of the original rule, of course, think that there should be no modifications of it, which would render this question inapplicable. NAITPD discusses the matter of "lead time", stating that even a game show takes at least six months, up to 18 months, from idea to production, and anything such as situation comedy or drama takes at least a year and up to two years. Selling starts in January and production in April for the fall season).46/ NAITPD claims that in view of this lead-time necessity, the fact that the Court appeared to believe the same 16 months should apply here as was given the networks in 1970-71, and the fact that the Commission "invited and encouraged" independent producers to enter into access-time production, an interval in that order is required before any modifications such as those adopted in January could be effective. It recommends, as a formula, an effective date at the start of the first full season 16 months or more after an unappealed Commission decision, or the first fall season starting at least 6 months after Court affirmance. Frank's position is much the same, 16 months after a final order. He claims that production of a pilot starts immediately after the November rating books come out, and selling starts in December and January; once a sale is made, production must start since Frank cannot sell on a contingency basis. ABC also urges a "fair" amount of lead time, plus taking whatever time in reaching a decision is necessary to arrive at a correct and defensible result.

C-73. Opponents Warner Brothers and MCA urge that the rule should be repealed at the earliest possible date -- September 1975. It is claimed that all parties have had enough notice as to what the Commission contemplates, and the fact that we issued a Further Notice does not affect this. 47/ The public interest -- that of the viewing public -- requires an end to the four years of injury caused by the rule. It is claimed that there is no real possibility of injury; game shows are made virtually overnight and many of them are additional episodes of network daytime material, animal shows are cut-and-paste assemblages of stock footage, and off-foreign-network programs deserve no particular FCC solicitude. CBS urges repeal of the rule in 1976, with the January 1974 modifications put into effect for 1975-76. It is stated that CBS' program plans begin about 18 months in advance of the start of any season, with the delivery of 25 or so pilots -- from which any new programs for the next season will be selected -- about February 15.

46/ In earlier pleadings seeking a stay, NAITPD referred to commitments for 1974-75 production made "early in the fall" of 1973.

47/ NAITPD claims that the Further Notice does make a difference that if the Commission had simply reaffirmed its January 1974 decision, except for the effective date, the notice period might be held to run from the date of that decision, but in light of the further proceedings, it does not.

This number would be sufficiently large so that additional programming could be developed from it to the extent permitted under our January decision -- basically, an hour extra on Sundays -- but not large enough so that it could program an additional half-hour every day of the week which would be permitted with complete repeal. 48/ CBS claims that actual marketing of access programs does not start until the end of the year, and production usually not till after that, with only minimal commitments at the planning and development stage; a decision by the end of December effective next September would mean littl,e if any, hardship to NAITPD members. Frank disputes this in reply comments (as noted above), claiming that CBS is looking only at its own convenience. Warner claims that CBS could begin programming a full schedule in 1975 if it chose to, noting a vast number of unused pilots, programs planned for this fall but deferred after the Court's decision, etc. -- or, if the networks cannot present expanded schedules, stations can fill the time themselves.

48/ CBS also argues that September 1975 is an appropriate time for the January 1974 modifications to be effective, citing General Telephone Co. v. U.S., 449 F. 2d 846 (C.A. 5, 1971), a case distinguished by the Court in reversing the Commission here but which CBS believes is now applicable in this connection, because of the notice that independent producers have had since January. It is also claimed that they do not have more than minimal financial commitments until they start selling activities the first of the year, so a December decision would work little if any hardship.

APPENDIX D

General Picture of "Access Period" Programming in 48 of Top 50 Markets, Week beginning September 21, 1974

The following data is taken from an analysis of TV Guide issues for the week starting September 21, 1974, for affiliated stations in 48 of the 1974-75 top 50 U.S. markets (Phoenix and Salt Lake City were omitted because the issues were not readily available). The data includes 146 stations (4 affiliates in the Grand Rapids-Kalamazoo-Battle Creek and Hartford-New Haven markets).

Omitted from the total of half-hours are 12 half-hours on West Coast ABC-owned stations or affiliates which carried ABC Monday-night football during this week starting at 6 p.m., and one 7:30-8 half-hour on one of the ABC Grand Rapids affiliates which was not identified in TV Guide. Thus, the analysis includes 724 half-hours for weekdays 7-7:30, 723 half-hours for week days 7:30-8, and 584 half-hours for weekends.

The data is intended to give a general picture only, and no attempt has been made to go beyond the TV Guide data in order to get absolute accuracy, for example as to whether in a few cases a locally produced program is basically local news or "other local", or, in the case of a few programs listed only in one market (and not otherwise identified in material filed in this proceeding) whether the program is locally produced or syndicated. 1/

Data as to foreign programming, at the end hereof, is taken from various listings contained in comments in Docket 19622.

1/ The programs Great Adventure and Agronsky and Company are counted as local at the station where they are produced and syndicated at the one other station carrying each. The program Help Thy Neighbor is counted as local, because it is locally produced even though the format is syndicated and there is some central supervision.

Access-period half-hours Devoted to Various Categories of Programs

Program Category 2/	Weekday (M-F) 7-7:30 p.m. No. 1/2 Hours	% of Total 1/2 hrs.	7:30-8 p.m. No. of 1/2 hrs.	% of Total 1/2 hrs.	Weekend No. of 1/2 hrs.	% of Total 1/2 hrs.
Network News 3/	128	17.7	--	0.0	7	1.2
Local:						
News	244	33.7	54	7.5	99	17.0
Movies	6	0.8	9	1.2	35	6.0
Other	8	1.1	42	5.8	93	15.9
Syndicated:						
Game Shows	312	43.1	466	64.5	66	11.3
Animal	6	0.8	58	8.0	78	13.4
Variety	7	1.0	30	4.2	118	20.2
Other 4/	13	1.8	64	8.9	88	15.1
Total	724	100.0	723	100.1	584	100.1

	Total for Week No. of 1/2 hrs.	% of Total
Network News	135	6.6
Local News	397	19.5
Local Movies	50	2.5
Other Local	143	7.0
Game Shows	844	41.6
Animal	142	7.0
Variety	155	7.6
Other	165	8.1
Total	2,031	99.9

2/ For the programs included in the various categories of syndicated programming, see the list of syndicated programs, below.

3/ The network news half-hours for the weekend include showings of ABC's Reasoner Report program at 7 p.m.

4/ "Other" syndicated programming includes four 7:30 weekday half-hours on one station identified only as "film".

Access-Period Syndicated Programs Shown in 48 of Top 50 Markets, Week of September 21, 1974 5/

Shown on Affiliated Stations in Access Time in 2 or more Markets 5/

Game Shows:
- Beat the Clock
- Bowling for Dollars
- Celebrity Sweepstakes
- Concentration
- Dealer's Choice
- Hollywood Squares
- Jeopardy
- Let's Make a Deal
- Masquerade Party
- Name That Tune
- The Price is Right
- To Tell the Truth
- Treasure Hunt
- Truth or Consequences
- $25,000 Pyramid
- What's My Line

Nature or "Animal" shows:
- Animal World
- Great Adventure
- Last of the Wild
- Life Around Us
- National Geographic
- Safari to Adventure
- Untamed World
- Wild Kingdom
- Wild Refuge
- Wild Wild World of Animals
- World of Survival

Musical Variety:
- Bobby Goldsboro
- Buck Owens
- Hee Haw
- Jimmy Dean
- Lawrence Welk
- Nashville Music
- Pop Goes the Country

Other programs:
- Agronsky and Co.
- Big Battles
- Candid Camera
- Evil Touch
- Garner Ted Armstrong
- Great Mysteries
- Just for Laughs
- My Partner the Ghost
- Ozzie's Girls
- Other People Other Places
- Police Surgeon
- Protectors
- Rainbow Sundae
- Salty the Sea Lion
- Thrill Seekers
- Wait Till Your Father Gets Home
- World at War

Programs listed in only one market: The following syndicated programs are listed in access time on one affiliated station in the 48 markets: Game: Sale of the Century. Outdoor, etc.: Audubon Wild Life Theatre; Strange Places. Musical Variety: Country Carnival; Tommy Faile; Porter Wagoner; Wilburn Brothers. Other: Big Blue Marble; Death Valley Days; Doctor in the House; Dusty's Trail; Family Classics; Laurel & Hardy; Mike Douglas (stripped in one market); Mouse Factory; NFL Game of the Week; Starlost; Wrestling.

The following programs, most of which appear to be syndicated but a few of which may be local, also appear in one market each: Candlepin Super Bowl; Duckpins (stripped); Funny People; Funny World of Sports; Honeymooners; High Road to Adventure; Listen, That's Love; McMasters of Sweetwater (a pilot); Race to Riches; Railroads Report; Secrets of the Deep; Spectrum Breaking; Spares, Strikes and Misses (stripped); The Making of...(documentary); Travelin' On; Wallace Wildlife; Window to the [illegible]t; World University Game. Three of these have been counted as local in the statistical analysis above.

5/ A number of these programs, e.g. Dusty's Trail and Ozzie's Girls, are no longer in production as of fall 1974, even though previously made episodes of them are shown as indicated.

Concurring Statement of Chairman Richard E. Wiley

In re

Prime Time Access Rule

I concur reluctantly in this latest revision of the prime time access rule. I have never been a great admirer of the rule primarily because I believe that it tends to involve the Commission too deeply in decisions which traditionally have been left to the marketplace. Moreover, as I see it, our experience to date with prime time access has not been encouraging in terms of fulfilling its stated objectives. However, the experimental nature of the rule is well recognized and, with the modifications adopted in this document, the rule may prove to be in the public interest. Without these modifications, however, I would vote for repeal. In this connection, I express the profound hope that this will be the Commission's last -- its very last -- effort to reform this rule.

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

RE: Second Report and Order on Prime Time Access

As a concession to the shortness of human life, I am in favor of the adoption of the item before us.

As I read this document, the original Prime Time Access Rule is affirmed with minor concessions, i.e., exemptions for children's programming, documentaries and public affairs - much of which, however, under Prime Time Access Rule I, was granted on a waiver basis.

Finally, as we state in our decision, "the rule [Prime Time Access] has not yet been fully tested," which, of course, has been due to the uncertainties of its lifetime. Therefore, the Commission's action of today has, once and for all, removed such uncertainties and has appropriately established a favorable climate for the development of "new and varied programming."

Dissenting Statement of Commissioner Glen O. Robinson

I. Introduction

The central concern which is addressed by the prime time access rule is "network dominance." The Commission's continued struggle with "network dominance" has been an adventure fully worthy of Don Quixote. Since the 1930's when the Commission first sallied forth in quest of a remedy for this evil -- the initial result of which was the first "chain broadcasting" rules in 1941*/ -- the Commission has doggedly pursued this aim of cutting down the networks' power. The intent has been noble, but the results have left the Commission, like its famous precursor, with a doleful countenance. As often as not it has missed the giants and jousted with windmills. The prime time access rule emerged from the latest of these jousts. Though the history of this rule is fully narrated in the Commission's 1974 Report and Order, 44 F.C.C. 2d 1081, some preliminary historical notes may be useful.

The concept of a prime time access period, freed of network control, was first proposed in the 1960's by Westinghouse Broadcasting as an alternative to a proposed further restriction or prohibition of "option time" practices.**/ In 1963, the Commission chose the latter

*/ These rules are, of course, essentially still in effect and are now applicable to television as well as radio. 47 C.F.R. 73.131-.136; 73.231-.238; 73.658.

**/ Under this practice network affiliates agreed to clear all sponsored programs offered by the network during certain hours -- subject to certain qualifications, and subject to limitations imposed by Commission rules.

alternative to the access proposal. Television Option Time, 34 F.C.C. 1103 (1963). However, the access idea was neither buried nor forgotten; it was merely shelved while the Commission waited to find out what would happen to "network dominance" as a result of the abolition of option time. Nothing happened. The giants were unvanquished (even the windmills showed no impact).

As a result, the Commission discarded its old lance and cast about for a new one. In 1965 it rode forth again with a new inquiry for ways "to foster free competition in television program markets" by providing "opportunity for entry of more competitive elements into the market for television programs for network exhibition," and encouraging "the growth of alternative sources of television programs for both network and non-network exhibition." To accomplish this the Commission first considered a rule which would have limited direct network licensing of programs to 50 percent of regularly-scheduled entertainment series during prime time. This "50-50" rule was intended to return to advertisers the program brokerage function which the networks had increasingly assumed in the late 1950's and 1960's. The purpose of this proposed rule was quite simple: to induce a greater number of firms to broker programs for prime time television. That alternative was rejected,

essentially because of ABC's objection that it would be unfairly disadvantaged by a system of independent program brokers. As a substitute, the access proposal which Westinghouse had renewed was adopted. Two other rules, contained in the 1965 proposed rules -- forbidding the networks to engage in domestic syndication or to hold a financial interest in programming not produced by the network*/ -- were also enacted. Network Television Broadcasting, 23 F.C.C. 2d 382 (1970). On appeal the Commission's rule was sustained on both statutory and constitutional grounds. Mt. Mansfield Television Inc. v. FCC, 442 F. 2d 470 (2d Cir. 1971).

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*/ The syndication and financial interest rules are not now before us; however, I cannot refrain from expressing my doubt that these rules have been beneficial. If a motion picture firm or other supplier performs the domestic syndication and if the network company does not have a majority interest in the profits from that syndication, there would seem to be little danger in allowing the networks to bargain for profit shares when they procure their programming. In fact, in doing so they relieve the supplying company of some of the risk involved in supplying programs. To disallow such interests is simply to prohibit the suppliers from selling part of the risk during the initial stages of contract negotiations. To the extent that networks are better able to pool this risk than suppliers -- particularly small suppliers -- it seems to me unwise to prohibit it. The argument advanced by some suppliers -- that profit shares were extorted from them by the networks -- seems implausible. Suppliers who complained of this extortion returned with new series year after year -- strange behavior for sophisticated, profit maximizing firms who are being "forced" to accept nonremunerative prices. I believe the ultimate practical effect of this prohibition has been not to reduce network power or to strengthen independent producers -- as was intended -- but simply to increase the dominant position of the major Hollywood film producers, those large enough to possess the risk capital to invest in programming without network support. See generally Crandall, The Economic Effect of Television-Network Program Ownership, 14 J. Law and Econ. 385 (1971).

Unfortunately, the results of the access rule proved to be not only disappointing but positively embarrassing. If "network dominance" had been partly altered (but not very effectively, as will be noted), it soon became visibly evident that the results--such as they were--were anything but an unmixed blessing. Even television critics who would ordinarily not count themselves as network fans grumbled at the program product that followed in the wake of the networks' departure. They still do; plainly the rule has not caused the "wasteland" to breed lilacs.

The rule produced other difficulties for the Commission in the form of requests for waivers of the rule to permit special network programs to be shown in the access period. This confronted the Commission with a vexing choice: either stand fast with its rule and an access-period game show, or waive the rule to permit a network children's special. Such a choice would give most critics and viewers little difficulty, but for the Commission to make such judgments obviously involved it in subjective program judgments that are not only troublesome but of questionable constitutionality. See, e.g., Campbell Soup Co., 24 P. & F. Radio Reg. 2d 856, 860 (1972) (dissenting opinion of Chairman Dean Burch). The Commission could, of course, have followed the counsel of NAITPD and denied any and all waivers--regardless of its views about (a) the need for such

specials, (b) their comparative worth vis a vis the displaced access fare. But, mirabile dictu, Commissioners are human and we often find it difficult to respond as Commissioners differently from how we would respond as viewers, particularly when the dilemma is the product of our own artifice.

One possible solution to the dilemma was to abolish the rule. In 1973 the Commission deliberated on that possibility. Unfortunately, the spectre of network dominance continued to turn like giant windmills in the Commission's consciousness. There was no evidence that the access rule had really had much effect on network power, for, among other things, the networks' continued ownership of stations in leading markets meant that, as station owners, the networks still retained the power to affect the success of access programming ventures.*/ But the notion persisted that something had to be done. The something was what came to be known in its brief existance as "prime time access rule two"--among the cognoscenti, "PTAR II." Prime Time Access Rule, 44 F.C.C. 2d 1081 (1974).

*/ This power derives from their control of all affiliates in three markets--New York, Los Angeles and Chicago--comprising twenty percent of the nation's television households and one affiliate in each of six other large markets embracing another 13 percent of television homes. Failure to sell these stations places an access-programming distributor at a severe disadvantage given the proportion of revenues which are realized from these largest markets.

The revised rule plainly reflected the Commission's ambivalence between curbing network dominance over programming on the one hand and retaining network programs (the kind for which waivers had been granted) on the other. The rule in substance: (1) removed all restrictions on the first half-hour; (2) permitted an increase in network programming on Sunday of up to an hour, or a total of four hours; (3) tied the "cleared" prime time specifically to the second half-hour of prime time, Monday-Saturday (7:30-8:00 p.m. E.T. and P.T., 6:30-7:00 p.m. C.T. and M.T.); (4) permitted one of these six half-hours to be used for network or off-network material of certain types--children's "specials" or public affairs or documentary material; and (5) barred "feature film" entirely from these six half-hours. 44 F.C.C. 2d at 1131. On appeal the revised rule was stayed on the ground that it had not given adequate lead time to independent producers, Association of Independent Television Producers and Distributors v. FCC, 502 F.2d 249 (2d Cir. 1974).

In returning the rule to us for reconsideration of an effective date, the Court also suggested that the Commission take a fresh look at the merits of the rule. 502 F.2d at 255-58. That is a sound suggestion. Unfortunately, the majority has not accepted it at face value. Though at one time or another a majority of my colleagues

have expressed a dislike for the access rule, they now assent to its continued existence. To be sure, they have modified the original rule, but all this does, I believe, is to underscore the inherent contradiction of purpose and the inherent artificiality of the rule itself. The access rule is retained--but so too are most of the waivers--in the form of permanent exceptions--for "special" network programs (primarily, public affairs, documentaries and children's programs). There appears to be no recognition that each part of the modified rule undercuts the other. Access is good, but it does not produce the kind of programming which we like so we have to provide the opportunity for such programming; we like such programming but if we see too much of it we see it as evidence of "network dominance" since it can only be supplied by network brokers.

In discussions about this new rule I have heard it rationalized as a compromise between the extremes of abolition and the 1970 rule. I suppose it is, but I do not think that alone will support it. Compromise is a convenience, often a necessity; it is not a virtue in itself. I see no particular convenience, no necessity--and certainly no virtue--in this rule. I have heard it surmised that a total abolition of the access rule, however meritorious it might be, is not legally practicable in light of the implications of the NAITPD case. Such a conclusion requires more reading between the lines of the court's opinion than I am willing to do, and more than I think proper. The court did invite us to take a new look at the merits of the rule and

nothing in that invitation suggested any limitation on such a reconsideration. In any event, such a reconsideration is inherently within our regulatory discretion. It is our responsibility to make a legislative judgment about this matter in light of public interest considerations as they become manifest. If in doing so we unwittingly depart from our authority, exceed our discretion, or otherwise affront the "Rule of Law," the court undoubtedly will, as it should, correct us. But I do not think we should fetter our judgment here with implied judicial directions when none has been expressed.*/

Apart from the legal question the majority apparently holds to their faith in the ultimate efficacy of the access rule. I think it is fair to say that many of my colleagues would not now endorse such a rule if it were before us as an original matter. However, now that we have come this far they believe it should be given more time to prove itself. In this they accept the view of a number of parties such as the Justice Department that prime time access has not been given a chance to work. Given the short period of time that the rule has been in effect and the insecurity of the rule throughout this short period, this view appears, on first acquaintance, reasonable.

*/ It should be stressed in this connection that the court in Mt. Mansfield, 442 F.2d at 479, specifically noted that the rule was experimental, and affirmed partly on this basis.

On further reflection, however, it is unpersuasive. One does not have to drop an egg on a hard floor a dozen times to learn that it will break. With a modest knowledge of eggs and hard floors even a single drop seems superfluous. So here: even our limited experimentation has been adequate to corroborate what should have been discerned at the outset by careful study of network economics: the rule would not have the intended effect. The rule cannot and will not work.

The prime time access rule, as originally promulgated, was intended to serve several, interrelated objectives that can, I think, be fairly summarized as follows: (1) to reduce network "dominance" over programming decisions, (2) to provide market opportunities to new creative talent which were presumed to be foreclosed by the network triopoly, (3) to re-establish local control of programming decisions which were presumed to have been increasingly appropriated by the networks (an increase in local programming was mentioned only incidentally as a benefit in the original order; however, it has since become an important rationale of the rule), and (4) to increase the supply of first-run syndicated programming.*/ The objectives stated in the Commission's present decision are essentially the same though (as in the 1970 decision) they are not described precisely in the same terms.

*/ See 23 F.C.C.2d 382, 394-97.

II. The Concept of Network Dominance

Throughout this proceeding and predecessor proceedings, the phrase "network dominance" has been repeatedly invoked in justification of a prime time rule. But this phrase is rarely defined, nor has anyone convincingly shown how the purported evils of "network dominance" are to be overcome simply by prohibiting the three national network companies from programming more than three prime time hours nightly.

Presumably, network dominance refers to the power which three national brokers of local station time and national programming have in selecting the nation's television program menu. In general, program suppliers must deal with one of these three network companies or forego national distribution of their product.*/ This limited number of potential buyers, it is asserted, presents the real threat of arbitrariness in program selection and the denial of access to program suppliers with new ideas. A second form of "network dominance" which emerges in the discussion of the rule is the ability of networks to persuade local affiliates to clear time for network programming. As networks expand their activities to new day parts, they progressively pre-empt the local station's ability to make its own program choices. The rule would return this choice to the stations, if for only one hour per day.

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*/ In the absence of the rule, first-run syndication is, practically, limited to the production and distribution of low-cost talk shows.

Unfortunately, there appears to be only a limited understanding that the chief cause of "network dominance," making inevitable some form of network power, derives from the Commission's own television frequency allocations. There are but three national networks for one important reason -- our allocations policy has dispersed VHF station allocations so as to allow most households to receive no more than three.*/ With only three competitive stations in markets comprising two-thirds of the nation's television households, there can be no more than three brokers for any given hour of national broadcasting.**/ It is a basic economic fact that, with a few exceptions, programs receiving less than national exposure cannot hope to compete for audiences with those achieving network distribution. If network distribution were not national, program budgets would have to be much lower per dollar of advertising generated. Network distribution allows the most efficient use of television advertising revenues in the stimulation of program production.

A network is more than a mere broker of station time. It is also an investor in programming. By agreeing in advance to commit its local affiliates to a given program series, and by guaranteeing

*/ Because of continued difficulty with UHF reception, it remains to be seen whether UHF allocations can provide the basis for a fully competitive fourth outlet.

**/ For conclusive proof of this proposition see Park, New Television Networks, (The Rand Corporation, 1973); and Crandall, The Economic Case for a Fourth Television Network, Public Policy, (forthcoming).

program suppliers a sum certain (in the form of a license fee) for a number of programs well in advance of exhibition, the network makes possible the investment of $250,000 or more per hour of entertainment fare. Without this "preselling," producers would not commit themselves to such program budgets.

To the extent that the Commission laments the decline in station program selection and the growth of "network dominance" in this process, it laments the development of efficient program brokerage. In this sense, what has been obtained from the prime time access rule is just what should have been expected: a fragmented array of low-cost, low-quality programs offered to local stations directly by producers without the intervention of a broker. Enormous energies and expenses are required in this distribution process -- expenses which are diverted directly from program budgets.

As time passes, it may be possible for program brokers to develop for just the access period. If this were to happen, however, we would be no closer to the goals which the majority hopes to attain than we were with PTAR I or II. Since market forces would distill no more than three such brokers from the set of current program distributors,*/ the best that can be realistically hoped for is the development of a new triopoly, which would "dominate" the access period.

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*/ It is unlikely that the Commission would be pleased with another possibility -- that a single broker might develop as the sole distributor of programming in the access period -- a possibility which cannot be dismissed on a priori economic grounds.

Unfortunately, this optimum is likely to be difficult to accomplish if there are any scale economies in performing network brokerage. A mere seven hours per week may not be sufficient to make efficient use of the personnel required to establish and enforce affiliate contracts, negotiate for program rights, select and schedule new program series and perform various research functions. The result may well be that a much greater share of the revenues for this period will be diverted to these brokerage functions than is true for the three existing networks.

At some point it is necessary to submit to the limitations of the real world. Although we would have it otherwise, the fact that there are only three station outlets limits us to three brokers of television programs at any given hour. As a result, program decisions will be virtually the same as those currently made by the three national network firms,*/ reflecting the tastes of the mass audience.

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*/ The only exception which may be taken to this statement is its failure to allow for continuity or "lead-in" effects. The absence of these during a network's terminal hour each day may make it more venturesome during that hour.

We can change the identity of the program suppliers, we can limit the time periods in which they are permitted to sell their wares, but the economic incentives*/ will remain unchanged: the profit maximizing firm**/ will tend to program to maximize audience shares in light of the number of viewing options. So long as the number of viewing options remains the same, the strategy of commercial programming will remain the same for any networking agency. See Steiner, Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting, 66 Q. J. Econ. 194 (1952); Rothenberg, Consumer Sovereignty and the Economics of Television, 4 Studies in Public Communication 45 (1962).

*/ In the course of many discussions with advocates of access it was repeatedly suggested that network program decisions were often made on "non-economic" grounds -- including but not limited to the personal whim of the network heads. Maybe so; but whether or not program decisions are always self-consciously economic, the decision had better lead to economically satisfactory results or heads will roll--as even casual students of network behavior know. In short, there is a kind of economic Darwinian process at work to assure economic results that are at least minimally acceptable. Cf. Alchian, Uncertainty, Evolution and Economic Theory, 58 J. Pol. Econ. 211 (1950).

**/ We need not concern ourselves with the question whether businesses aim to maximize profits or some other purpose. (See generally, F. Scherer, Industrial Market Structure and Economic Performance, 27-36 (1970)). Whether or not the networks seek to maximize profits is irrelevant here for there is no reason to suppose that the new program brokers would be any less profit motivated than the networks.

Increasing the number of brokers will not expand the number of programs presented and will not significantly change the type of programs broadcast. All one can confidently expect of programming brokered by the "mini-network" is a decline in the quality of programming due to the inefficiencies of small-scale network activity.

It could be argued that increasing the number of brokers of programs for prime time from three to six, by limiting the existing three to no more than three hours, is a major improvement, because then program suppliers can turn to six rather than three potential buyers. I do not think that this state of affairs would constitute any significant improvement. The same economic forces apply to each set of three brokers seeking to fill a given period with programming opposite only two rivals. I assume that these economic forces would be the dominant influence in how program decisions are made. Furthermore, since the efficiency of brokering only one hour per day (particularly if that hour is early prime time, when both audience and revenue are lower than the average of all prime time hours) is almost certainly much less than those typical of the three existing networks -- it is clear to me that in order to get three extra, identically motivated program buyers, we must require the public to forego the sort of programming they consistently prefer when given a choice in the matter -- high-quality, high-budget fare like that the present networks offer in prime time. To me, this trade-off is unacceptable.

III. Program Access, Quality, and Diversity

Searching through the current access period programming in pursuit of the gems which the three networks are supposed, in their capriciousness, to avoid, is a frustrating business. No definition of program quality seems to me congruent with the current run of access programs, an opinion which appears to be widely shared -- by Commissioners,*/ television critics**/ and quite a few viewers.***/ Of course measures of quality are elusive at best, and one's interpretation of the prudence of continuing the rule cannot depend solely upon comparisons between network and access programs. In particular I

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*/ In its 1974 report the Commission expressly noted its concern over the inferior quality and diversity of programming which its 1970 rule had spawned. See 44 F.C.C. 2d at 1132, 1134, 1137-38. It reported the same concern to the court of appeals in the NAITPD case. See Brief of the F.C.C., pp. 18, 25.

**/ A small sample of some of the critical reviews: The Washington Post, 7/14/74: "a cultural disaster"; The New York Times, 9/14/72: "[Access time] has been monopolized by inane game shows and penny-budget disasters"; The Los Angeles Times, 9/20/74: "progressively dismal."

***/ As shown by ARB audience data for network affiliates' access programs where matched against the programming of independent stations; this is discussed below.

am mindful of the First Amendment restrictions that preclude us from judging the merits of the access rule by engaging in critical review of, say, "Bowling for Dollars" or "Let's Make a Deal."*/ However, a major premise of the rule was, and is, that it would promote diversity -- by promoting new sources of programming, reflecting different ideas and creative energies.**/ I assume we can, without affronting the First Amendment, ask whether this goal has been or can be achieved under the rule.

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*/ Though we may, I take it, consider the response of critics and of the public at least in characterizing and classifying the programming. See NBC v. FCC ___ F. 2d ___, slip opinion p. 46-47, (D.C. Cir. 1974), vacated, Dec. 13, 1974 (en banc).

**/ It has been argued by some proponents of the rule that it was not intended to promote diversity in programming but only more program sources. See, e.g., the concurring opinion of Commissioner Cox in the 1970 decision, 23 F.C.C. 2d 416, 419. That does not make much sense to me. What was the supposed benefit of additional program sources if it was not assumed that it would increase at least the possibility of diversity in programming?

In any case, I do not read the present Commission decision as endorsing Cox's dichotomy between sources and product. Rather it is the majority's view (1) that the rule has not had a fair test by which to judge diversity, (2) the rule has produced some degree of diversity, (3) the Commission can only examine diversity on a very limited basis (because of First Amendment considerations); (4) it is difficult to develop standards of diversity. The first point I have answered earlier. Insofar as the second point warrants an answer it is given in the discussion which follows. I might also note that the Commission's statement contradicts what was said a year ago when it expressed its concern with the lack of diversity which the rule had produced. See 44 F.C.C. 2d at 1132, 1134, 1137-38. The third point is acknowledged but, as I note in text, I think we can consider certain objective indicia of diversity (vel non). Inasmuch as our rule is predicated ultimately on that aim we are not forbidden from considering the kind of facts which are discussed above, relating to both type of programming and also programming sources. The fourth point is I believe also answered by the foregoing. Here again it should be noticed that the Commission has earlier made judgments on diversity, and found it wanting.

The first three years under the rule proceeded as one would expect. With no one assured that the rule would continue for an extended period, program suppliers were unwilling to commit resources to expensive series formats. Unable to line up stations in advance for a distant period, during which the rule might no longer exist, these suppliers instead focused upon series which could be produced cheaply and quickly. As a result, the access period has been dominated by (1) game shows which can be mounted and filmed in a very short period of time (most of these are revivals of old network shows or "new" episodes of daytime game shows); (2) recently discontinued network series whose development costs and lead times were equal to zero (e.g., "Hee Haw" and "Lawrence Welk"); and (3) various "nature/wildlife" features which could be drawn in large part from existing footage (e.g., "Wildlife Kingdom," and "Wild Wild World of Animals").*/ Given the absence of large-budget programs in the portfolios of syndicators, many firms were induced to attempt to produce and distribute

*/ A detailed breakdown of the access programs is given in the Joint Appendix of Columbia Pictures Television et al., September 20, 1974. Among other things the following is noteworthy. In 1974-75 over 65 percent of the programs in the access period were game shows--a five-fold increase over the east pre-PTAR period, 1970-71, when the figure was 11 percent. In the 1974-75 season, 17 of the top 22 access shows (accounting for 87 percent of all syndicated access programming) had been broadcast before the access rule, 16 had been broadcast (as network programs) before the access rule. Many of these shows, in fact, continue to be produced with network facilities (and some are still broadcast as network shows).

low-cost series of their own. Had higher-cost, network-quality series been available to stations for the access period, many of the inexpensive ventures would never have been attempted.*/

The market for access programs has already begun to distinguish the programs with audience appeal from those with little value to viewers. A few series, such as "To Tell the Truth," "Hee Haw," "Lawrence Welk," "Let's Make A Deal," and other similar programs, dominate the access market while myriad other programming ventures realize very limited sales and are dropped by syndicators.**/ This trend will continue if the Commission's Order stands and the rule remains in force for a number of years. Only those programs achieving full national distribution, obtaining clearance in a large proportion of markets, will be able to cover the costs of production, which syndicators will soon

*/ The NAITPD contention that 106 programs were available for access exhibition in 1973-74 is an indication of this phenomenon, reflecting several times as many programs as would be necessary to fill the access time period on a one exhibition per week basis.

**/ Data on the sad story of access programming may be found in periodic ARB Syndicated Program Analysis reports.

find beginning to escalate.*/ Thus, one of the purported benefits of the rule--the large number of programs available for the period (in contrast to the twenty-one hours available from networks if they programmed the full access period) will soon evaporate as the rule assumes a more permanent appearance.

The Commission should not lament this decline in the number of access programs as it develops. It is only through the process of funneling the total national advertising revenues available for the period into program budgets of a smaller set of programs exhibited in every market that suppliers of access programs will be able to compete for resources with those supplying network fare and to offer quality programs. In short, quantity and quality are inversely related in this market through their interaction in the program budgets of suppliers. If the Commission maintains the status quo--a system in which the necessary program brokerage function does not exist--then numerous low-cost, low-budget programs will continue to be the only form of access programming. In terms of viewer welfare, this cost is enormous.

That the current access programs are not only cheaper but less lovely in the eyes of their beholders is clear. The average audience of independents in four-or-more station markets has

*/ Indeed, one of the most important costs of program production--the salaries of the "talent"--is directly tied to the popularity of the program.

increased markedly during the access period since their competitors, the affiliates, have been forced to forego network brokered series.*/ The independents, who continue to exhibit old feature films and old network series during the period, have been the beneficiaries of a considerable bonanza during the period in which they enjoyed larger advertising revenues with unchanged program costs. As syndicators of feature films and off-network series have begun to respond to this phenomenon by increasing their program prices, the independent stations' attachment to the rule has weakened somewhat. Nevertheless, the fact that these independents continue to enjoy larger audiences than they did when they were faced with network competition is ample testimony to the inferiority**/ of access shows in comparison to network series.

Whether new creative energies have been unleashed by the rule I also doubt. The NAITPD points to the number of suppliers active in the access market who are not active in network program

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*/ In 28 of the largest 50 markets in which there are four or more stations, the network affiliates have lost an average of one-sixth of their audience from November 1970 to November 1973, during the access period, Monday through Friday. See ARB, Day Part Audience Summary.

**/ I do not mean anything metaphysical about the inferior/superior dichotomy herein. It is a free country, and I think I am entitled to assume that viewers know (and prefer) quality when they see it.

supply to prove that the rule has provided access to new creative agents in the industry. However, the fact that most of the access programs are the product of established agents sheds lavish doubt on NAITPD's conclusion.*/ Moreover, such new "talent" as has appeared has chiefly resulted from the removal of any high-cost, quality competition. It is not surprising that the creative agents involved in producing the sort of programs that have come to dominate the access period are different from those involved in network production. To argue that providing opportunities for such suppliers is desirable of itself is a bit like arguing that a dozen hot dogs ought to be preferred to a single steak.

IV. Local Station Programming Responsibility

The Commission has always sought to encourage local station responsibility for program material and its selection. It was for this reason that various forms of "option time," allowing networks to mandate a number of hours of prime time without giving the local station the option to carry or reject the programming, were prohibited in 1963. That same aim of promoting greater station freedom in choosing programs is inherent in the present access rule.

For entertainment programming, and for most high quality programming other than local news, the goal of local station responsibility for programming in typical prime-time hours is as a practical matter

*/ See Joint Appendix of Columbia Pictures Television, Sept. 20, 1974, Table VIII for a list of producers of the top 22 access shows.

difficult to achieve. Such programs are not produced for a local, but rather for a national market. The economics of the medium require station managers in each market to exhibit principally those programs which have national acceptance. To the extent that a local station attempts to order its own program or to produce a program itself, it generally sacrifices viewer appeal and revenues--at least if its rivals use the best programming available from the national market. Thus, it is inevitable that programming decisions, particularly for entertainment series, are largely beyond the realm of local-station initiative.

The Commission seems virtually to admit as much in creating a broad exemption from the access rule for "special" network programs--most notably children's programs, documentaries and public affairs programs. Thus, on the one hand the Commission applauds the freedom given local stations by the access period, but on the other hand it acknowledges that this compulsory freedom has killed (or, without repeated waivers, would have killed) high quality programming. So the Commission engineers a number of permanent exceptions to the rule so that we can continue to enjoy high quality programming--

of the kind which we like.*/ Thus, the Commission has apparently learned to do what no one else has, to have its cake and eat it too. The secret is to eat all but a slice and then pretend that the slice that remains is all there ever was.

I am basically sympathetic to the Commission's ideals and sensitive to the dilemma of attempting to create a structure in which some degree of local station responsibility can coexist with an efficient, high-quality system of program production and distribution. But I cannot accept the Commission's artificial, and ultimately self-defeating, manner of increasing local responsibility.

I would continue to insist that local stations exercise some judgment in what they accept. They have that legal right and responsibility now. I grant that economics do not favor its frequent exercise (any more than the facts of life favor the frequent exercise of our power to revoke licenses) but neither does the access rule. I do not think the access rule will provide the kind of benefits which the Commission expects from greater "local responsibility." It may increase the wealth of network affiliated stations, as it has to date (though I think

*/ I note the seeming contradiction between the Commission's statement, on the one hand, that it is unable to make a judgment on the quality of game shows and other access programs, and on the other hand its creation of an exemption for "public affairs," "documentaries" and "children's programs." This paradox simply mirrors and carries forward a larger paradox: the tension between the Commission's expressed concern that we not allow our own programming preferences to dictate the nature of the rule, as contrasted with the obvious fact that having the rule in the first place substitutes our choice for public choice in television programming.

much of this will increasingly be shifted to distributors as syndication costs rise). But I am not terribly concerned with the profitability of these stations; I do not think it is the role of the FCC to redistribute profits within the industry, at least not for its own sake.

The Commission opines that with their increased profits and new "freedom" from network "control," local stations will produce more local programming--particularly of the kind which we favor (children's programming, public affairs and the like).*/

The amount of such local programming that has so far filled the access period is something less than overwhelming. However, taking the most favorable view of what has occurred and what might be expected to occur, I am still not persuaded that the gain exceeds the loss. If the rule has increased the incentive for additional local programming, it has done so largely by degrading the competition.

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*/ Increased local programming was not itself a major objective of the rule as originally formulated in 1970--though it was mentioned in passing as a possible incidental benefit, 23 F.C.C. 2d at 395 n. 37. However, since then the emphasis on local programming has grown to become a significant element. Thus, in 1974 the Commission observed: "we regard it as important to preserve substantial 'cleared' time for the development of local programming efforts--one of the really significant benefits from the rule so far. . . ." 44 F.C.C. 2d at 1134. In the present opinion the Commission continues to emphasize local programming as an aim of the rule.

The access rule has lowered program quality so much that individual station managers have been less reluctant to offer local programs oposite the access shows than they would be to pre-empt a network show opposite two other network programs. The audience loss is simply smaller for these examples of public-service broadcasting than it would be in the absence of the rule. In short, to the extent that the rule has encouraged greater local-station responsibility over programming, it has done so because the array of nationally-distributed programs has been of very low quality. Continuing to guarantee local station licensees low-quality competition on rival stations*/ in order to induce them to fulfill their responsibility to broadcast in the public interest is an unacceptable strategy. The Commission ought to be able to design a better method of enforcing licensees' obligations to the public.

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*/ Inasmuch as the Commission does not now peg the access rule to a single period, it is possible, of course, that networks could schedule programs against local programming on opposing stations -- which would defeat this expectation. However, I would expect the networks to continue present schedules for the later hours of prime time, on a more or less uniform basis with the result that access programming will continue to be confined to a fixed period.

V. Economic Viability of Access Programming

The Commission has been besieged with claims that the economics of program production and distribution make it impossible for quality programs to develop during the access period. As a result, the hapless viewers are increasingly faced with inexpensive game shows, and the suppliers of program talent and the major motion picture studios have been damaged by a reduction in the demand for their product.*/

As pointed out above, the rule has perforce generated a large number of inexpensive programs. The total program payments generated during the access period are probably somewhat less than those which would emanate from the three network companies, but this state of affairs will not endure indefinitely. Given the competition among three stations in most markets, it is likely that the share of total revenues generated in program payments will be roughly comparable. Once the market develops the necessary brokerage function described above, the total revenues and costs from access period programs should compare favorably with the network programs displaced.

One feature of the rule which has been noted is the possible effect upon advertising revenues. Some observers apparently believe that network power has been increased because advertisers are unable

*/ I should emphasize here that I do not in any way rest my dissent on solicitude for talent suppliers, or motion picture studios. As I have stated elsewhere (see my separate statement to the notice of inquiry on reruns, FCC 74-1067) I doubt the "impact on Hollywood" (as this issue has come to be described) is, of itself, a matter within our legitimate concern; and, even if it is within our prerogative to consider, I would not give it substantial weight in measuring the public interest effect of our rules.

or unwilling to shift their demands to the spot market and to buy space in access programs.*/ Therefore, it is claimed, the networks have been given the opportunity to raise the price of advertising minutes since their supply has fallen. In fact, much of the increase in the cost per thousand viewers on network prime time television since 1971 has been the result of sharply rising total television advertising demand. It seems quite unlikely that the rule has added measurably to this rise in prices; I believe it is more plausible to suppose that advertising revenues have shifted from the network market to the spot market and that revenues per viewer minute in the access period have not been affected by the rule.**/

An important side effect of the rule has been the sharp increase in total advertising messages in the access period as many stations have introduced five commercial minutes of advertising plus station breaks into their access programs.

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*/ This contention appears for example in the so-called Pearce Report, The Economic Consequences of the Federal Communications Commission's Prime Time Access Rule on the Broadcasting and Production Industries, September 1973, p. 37. It is also urged in comments by several access opponents, as discussed in Appendix C.

**/ The average cost per thousand viewing homes on network television rose only two percent from 1970 through 1972, a period during which the rule should have had maximum impact. During this same period, local station spot revenues during prime time increased by approximately $125 million due to the rule, reflecting an increase of nearly ten percent in total spot revenues.

Indeed, most access series are produced with more commercial interruption time than network series. Thus, the access programs are not only of lower quality but interrupted more with commercial messages.*/ In light of this it is not surprising that the NAITPD can demonstrate that the access period can generate sufficient revenues to support programming. With more-numerous commercial minutes during access time, it is even possible that revenues from this period will be even greater than those which would be forthcoming if the networks programmed this period. It is unfortunate that so much of these revenues may continue to be wasted on transaction costs between stations and program suppliers.

VI. The Choices Faced by the Commission

The Commission faces the difficult task of admitting that the goals which it set for the access rule are unattainable. Taken literally, the goal of reducing network dominance can only be achieved at the cost of denying the market the benefits of brokerage, with a resulting cheapening of production values. A more liberal interpretation would define reduced network dominance as occurring even if three new network organizations formed for the access period. But if these new network organizations form, the proliferation of programs and the accompanying increase in the number of potential suppliers would eventually -- and

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*/ Considering the quality of the access programs some critics might look on increased commercial interruption as benign relief. That is not quite the way the Commission rationalizes it. It contends that the increased advertising is offset by the increased opportunity for local advertisers. That assertion seems to me rather disingenuous and in stark contrast to the past occasions in which we have expressed concern about over-commercialization -- without noting that it was balanced by the increased opportunity given to advertisers.

sooner rather than later -- be reversed. The access period would come to resemble the other hours, and local stations would be just as reluctant to pre-empt "network" fare during this hour as during later hours. In short, reducing "network dominance," stimulating access of "new" program ideas and "creative" energies, and encouraging more local programming cannot be reconciled with the development of the market functions necessary to generate quality programming.

Given this inevitable conflict in goals, the Commission has the choice of continuing the rule, amending it, or actually doing something about "network dominance" in a way that will not also reduce program quality. The consequences of continuing the rule in the current uncertain environment are well documented in the filings before the Commission. Amending the rule as the Commission has done, to except certain types of programming involves us in the area of selecting programming, which I believe is a most dubious venture even assuming its constitutionality. Thus, the imperative exists for reducing network power in a more direct, effective manner.

One alternative for reducing "network dominance" without affecting network power over the price of programs or advertising messages and without affecting program decisions, is simply to divide the broadcast day into several segments, separate but equal. The Commission is beginning such a division with the access rule, but it is not striving for equality in the segments. This seems to betray less than a full conviction

in the logic of its decision. If we really want to cut the prime time market into separate segments, why not divide prime time into two equal two-hour periods, allowing an individual network broker to program only one of these segments? Or -- indeed -- why not extend the division into other day parts so as perhaps to create three or four sets of brokers during different program hours? Of course, such a division would literally increase the number of network organizations and, thus, reduce "network dominance" but it would have little other effect. Program suppliers could seek to vend their wares in six or nine offices rather than in three, but the number of programming hours and the economics of program selection would be unchanged. The producer with a show designed to delight ten percent of the audience would encounter six or nine closed doors, not three. It is important, however, that the division of the broadcast day be effected in such a manner as to give each network a fairly large number of weekly program hours. The problem with the access rule is that seven weekly hours are so few as to create the possibility of serious scale diseconomies in carrying out network functions. There may be economies which are not exhausted until the entire broadcast day is brokered by a single organization for one station in each market, but the diseconomies inherent in dividing this day into two unequal segments would be avoided by giving each firm at least 14 weekly prime viewing hours.

The disadvantages of this sort of solution are obvious to most industry observers. To the extent that total network operating costs are increased by this mandatory reduction in each firm's activity, the discretionary revenues available for a variety of public service purposes are also reduced. The Commission would then be (as it currently is) in the position of deflecting broadcast profits into transaction costs despite the fact that some of these profits could be channeled into public affairs offerings or occasional cultural programs. This trade-off cannot be considered favorable, especially if it is only achieved after a long transition period during which audiences are afforded only cheap game shows in the access period.

If we wish to commit ourselves seriously to reducing "network dominance," I believe we have to focus our attention on the basic source of the problem: the limited number of economically competitive television stations in each market. What is wanted is a means to increase the number of stations. One step in this direction -- a limited one -- might be VHF drop-ins. Alternatively (or additionally), some form of deintermixture -- by community or region -- might be undertaken in order to strengthen UHF and thereby to permit an increase in station outlets. I am well aware that both drop-ins and deintermixture are not

simple, easy solutions. Both have drawbacks and limitations.*/ Perhaps the most important liability is political; in fact memory of the warfare that these measures produced in the late 1950's and early 1960's**/ makes me hesitate even to suggest them. However, I see no other less controversial solutions. Cable could offer a competitive solution. But, of course, the growth and development of cable is currently as controversial as drop-ins or deintermixture, and the Commission's refusal to permit freer development of cable, and particularly its refusal to liberate pay cable from what I think are unwarranted fetters, has for now virtually foreclosed this competitive option in the same way that its allocations decisions have limited intra-broadcast competition.

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*/ Drop-ins would provide an incomplete solution since the number of drop-ins that has so far been considered as technically feasible would fall short of the number necessary to support a fourth network. See Basen and Hanley, Market Size, VHF Allocations and the Viability of Television Stations, (unpublished manuscript, September 1974). In the case of deintermixture the chief drawback is the relative inferiority of UHF--essentially a function of two things: the added cost of providing service coverage commensurate to VHF, and the inadequate technical capability of present receivers. See Corporation for Public Broadcasting, A Quantitative Comparison of the Relative Performance of VHF and Broadcast Systems Tech. Mono. 1 (1974). However, the first problem would be minimized if competition with VHF were eliminated in particular markets, and the second problem would probably disappear if a substantial number of UHF-only markets were created, creating a substantial economic incentive for set manufacturers to correct the problem.

**/ A brief summary is given in G. Robinson & E. Gellhorn, The Administrative Process, 156-57 (1974).

Unless the Commission confronts the issue of network economic power head-on, it will simply sit as a constant arbitrator among groups competing for the scarcity rents which it has created by its allocations plan and the current access rule. The Commission should not be forced to determine how these rents should be divided between large Hollywood motion picture companies and smaller purveyors of game shows. Rather, it should carry out its authority to increase competitive outlets in a manner which prevents the development of monopoly power. If it is unwilling to do this, it should simply return to the status quo ante, allowing the three national network companies to program as much or as little of the prime-time period as they wish. This last is obviously the most realistic option at this point; and in light of the past few years' experience, together with what I believe are the demonstrable facts of economic life, I think the Commission should embrace it.

CONCURRING OPINION

OF

COMMISSIONER CHARLOTTE T. REID

(In the Matter of Consideration of the operation of, and possible changes in, the prime time access rule, Section 73.658(k) of the Commission's Rules)

Once again we face the issue of the Prime Time Access Rule. When we adopted PTAR II, in January, 1974, I made it clear in my concurring statement that I felt the compromise that was reached there was a reasonable one under all the facts and circumstances even though my initial view was that the Rule had not proven itself to be in the public interest.

Again, I find myself concurring with the action of the majority because I believe the final package represents as good a solution as possible to the immediate issues before us, but I would hope, even expect, that we would not revisit this rule unless it is for the purpose of repealing the PTAR,

I am not suggesting that this Commission will, in fact, repeal the rule, but I am still not convinced that the rule really is in the public interest. To that end, I would expect that we will gain some definitive factual material from the continuance of PTAR and we will simply have to "wait and see."

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of Consideration of the operation of, and possible changes in, the prime time access rule, §73.658(k) of the Commission's Rules.	)	Docket No. 19622

E R R A T U M

Released: January 23, 1975

In the Commission's Second Report and Order in Docket 19622, adopted January 16 and released January 17, 1975 (FCC 75-67), there was inadvertently omitted the sentence setting forth the authority for the Commission's adoption of the rules changes made. Accordingly, the following sentence is added to paragraph 65, p. 32 of that document (as released January 17):

> Authority for the rules changes adopted herein is contained in Sections 1, 2, 4(i), 301, 303(b), (f), (g), (i) & (r), and 313 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

CERTIFICATE OF SERVICE

I, Arthur Eisenbach, do hereby certify that copies of this Joint Appendix, United States Court of Appeals for the Second Circuit, Case Nos. 75-4021, 4024, 4025, 4026, have been mailed First Class postage prepaid, this 21st day of February 1975 to:

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